October Term, 1889.

No. 138.

IN THE

Supreme Court of the United States.

The Insurance Company of North America,
Appellant,

vs.

The Hibernia Insurance Company of New Orleans,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF OF APPELLANT.

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For Appellant.

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HISTORY OF THE CASE.

The Insurance Company of North America, incorporated in 1794, has a capital amounting to $3,000,000 and assets amounting to about $8,500,000. Its principal office is in the city of Philadelphia, but it has numerous agencies both in the United States and abroad. The amount of marine business done by it is very large, the risks taken amounting to many millions annually. Like all large marine insurance companies, the North America, in order to accommodate its customers and hold its business, must be and is prepared to insure on demand very large sums upon particular vessels or cargoes. It is, of course, unwise and impracticable for any one company to carry alone very large risks on any one bottom. It is, therefore, the practice of the North America, in common with all other large insurers, to reinsure in such cases a portion of the amount of risk, so as to reduce the actual interest in the transaction to a safe sum for the company to carry. The amount carried by a

company in this manner is termed a "line." This "line" is not, in the case of the North America or of any other large company, any invariably fixed sum. It differs with the season of the year, the character of the voyage, the rating of the ship, the nature of its cargo, and numerous other considerations. The "line" carried by the North America is sometimes as high as $100,000 and sometimes as low as $10,000.

Reinsurance is occasionally effected by special policies upon special applications, but more commonly by means of open policies. Such policies are of two kinds.

(1.) Open policies on stated excesses. Such policies are issued directly to the reinsured company. The operative words of such policies are to the following effect:—

"By this policy of reinsurance the A company agree to reinsure the B company on merchandise, &c. This policy is to apply to the excess which said B company may have on all their various policies over $60,000, and to apply *pro rata* upon all reinsurances on same excess, but not to exceed $10,000 by any one steam or sail vessel."

The moment the reinsured company takes a risk to which an open policy is applicable, the liability attaches. No notice to the reinsuring company is necessary, though usually for convenience given.

(2.) Open policies issued to an agent or representative of the reinsuring company, under which reinsurance can be obtained upon application, either upon stated excess or flat, *i. e.*, without regard to any excess. Such policies do not attach until application for an insurance under them is made and accepted by the agent or representative of the reinsuring company. Then, and then only, are they called into life.

A large amount of reinsurance is ordinarily placed by insurance companies under open policies on excess, but the open policies under which general reinsurance can be obtained are not less useful. It becomes often necessary to reduce lines below the excesses stated in existing policies, either by reinsuring on lower excesses or placing amounts "flat." For this purpose the second form of policy, stated above, is immediately available. So much is essential as a preliminary explanation of the outline of the reinsuring business.

The Hibernia Insurance Company, with assets of $400,000, does a limited marine business in the city of New Orleans. A portion of its business in that city is transacted by the firm of Marshall J. Smith & Co. In the early fall of 1880 Marshall J. Smith, of that firm, was in Philadelphia and called upon Charles Platt, Jr., an insurance broker of that city. Charles Platt, Jr., is the son of Charles Platt, president of the Insurance Company of North America, but is in no way connected with the company in business. He has a separate office and does not act for or on behalf of the North America, as agent or otherwise. Smith, in conversation with Charles Platt, Jr., proposed that the latter should endeavor to arrange with the North America to accept through Platt reinsurances in the Hibernia under an open policy to be issued to Platt in his name, so that Platt could get a commission, and at the same time secure to the Hibernia a share of the North America's reinsurance business. It was arranged between them that Smith, upon his return to New Orleans, should write to Platt on the subject.

In pursuance of this conversation Marshall J. Smith & Co., on October 6th, 1880, wrote the following letter to Charles Platt, Jr. :—

"OCTOBER 6th, 1880.

Charles Platt, Jr., Esq., Philadelphia.

DEAR SIR :—Our Mr. Smith has returned home, and begs to refer to his conversation with you in regard to reinsuring here the excess lines of the North America. We have consulted with the officers of the Hibernia Insurance Company, a branch of which company is under our management, and we propose to take a proportion of the general reinsurance of the North America, excepting coastwise risks from New York here, of which business at the present rates we believe the North America does little.

The Hibernia will carry a line of $10,000 on all foreign business of the company at all ports excepting New Orleans; from New Orleans the line must be limited to $5000, as the Hibernia often have a line from their customers, and they may unknowingly double on a vessel. The Hibernia will allow twenty-five per cent. rebate and to you a brokerage of five per cent. Should you be able to arrange this please notify us at once. The Hibernia Insurance Company has a capital of $400,000 paid up, is conservative, and we look upon it here as in every way first class for the amount of risk they will assume.

Yours, truly,

M. J. SMITH & CO."

Charles Platt, Jr., called on the officers of the North America and on October 11th, 1880, wrote to Marshall J. Smith & Co. the letter following:—

"CHARLES PLATT, JR., *Insurance*,
331 Walnut Street, Philadelphia.

PHILADELPHIA, October 11th, 1880.

Marshall J. Smith, Esq., New Orleans.

DEAR SIR:—Your valued favor of the 6th inst. is received, and I note contents with care. The Insurance Company of North America through me will be glad to enter into the reinsurance arrangement with the 'Hibernia' on the terms named. I inclose herewith a policy I had with the 'Home' Insurance Company of Newark, New Jersey, which you can take a copy of on a 'Hibernia' policy, making the sum insured $10,000. Please send me the policy and I can begin at once. Of course all risks accepted by me will be such that the Insurance Company of North America carries their line on, and all the risks that are bound by me will be held by the company, as it will not do to have any cancellations. Shall I report all risks to you or the 'Hibernia' Company direct. I see no reason why the arrangement should not prove a success, and I will do all I can to make it so. The most part of it will be grain and general cargoes from Atlantic ports to Europe. Please return the Home policy. With many thanks and regards from Mr. Priolet and myself, I am, yours very truly,

CHARLES PLATT, JR."

In pursuance of this letter the Hibernia Insurance Company, under date of October 13th, 1880, made and issued to Charles Platt, Jr., a policy known as No. 268, reading as follows:—

"The Hibernia Insurance Company of New Orleans by this policy of insurance do make insurance and cause to be insured Charles Platt, Jr., for account of whom it may concern, lost or not lost, at and from ports in the United States, and foreign ports, upon all kinds of lawful goods and merchandise, &c."

The policy is in the usual form of a policy of marine insurance (not reinsurance) with the name of vessel, voyage, premiums, and amount at risk left blank. On the policy was the following indorsement:—

"This policy is limited to the sum of $10,000 upon any one vessel from all ports except from New Orleans, where the limit is hereby agreed to and understood to be $5000. This policy is not to cover any risk from port or ports to New Orleans. Notice of each shipment to be given to Marshall J. Smith & Co., managers, as soon as known, and amounts declared as soon as ascertained. The policy to be continuous until canceled by either party giving twenty days' notice, but without any prejudice to risks pending at the date of cancellation."

The policy was exhibited by Platt to the officers of the North America, but as it was his, and not theirs, he retained it in his possession. It does not appear that at the time of issuing this policy the Hibernia had any special knowledge as to the amounts commonly risked by the North America or as to the details of its reinsuring business; it had, of course, knowledge of the reputation of the North America as a large, well-managed, and reputable company.

The business under policy 268 was transacted in the following manner: Whenever the North America desired reinsurance on the policy a blank application was filled out and sent to Charles Platt, Jr., as the representative and agent of the Hibernia, in the following form:—

"PHILADELPHIA, , 18

Reinsurance is wanted by the Insurance Company of North America for $ on on board of the , at and from ; to apply to the excess which the said company may have on all their various policies on vessel, freight, cargo, or profits, including specie or treasure, over $, and to apply *pro rata* with all reinsurance policies on same excess, but not to exceed $

To remain open until particulars are given in.

Premium, per cent., less per cent., $. When and where built, ; number of decks, ; tonnage, ; rate, .

, *Secretary.*

To the ."

When flat reinsurance was wanted a similar form was used, omitting the statements as to excess.

Charles Platt, Jr., acting for the Hibernia, passed upon these applications, and, in cases where he accepted the risk, entered the particulars thereof on his books, and forthwith forwarded a certificate of the fact to Marshall J. Smith & Co., in the following form:—

"Office of
CHARLES PLATT, JR., Philadelphia.

Certificate No. . *No.* .

Insurance has been made in the Hibernia Insurance Company of New Orleans, under open policy No. 268, for Insurance Company of North America, payable, in case of loss, to them, for $ upon on board at and from to .

When built, ; where built, ; metaled, ; tonnage, . Remarks, ; rate, ; premium, per cent., $.

CHARLES PLATT, JR.

PHILADELPHIA, , 188 ."

As the cargoes insured were frequently shipped from distant points, it was of course impossible for the North America, in many instances, to know at once the exact amount at risk, and accordingly, when applications were made for reinsurances on the excess of stated sums, the precise amount of the excess and the precise amount, therefore, of risk attaching, were often unknown. As soon as advices were received the North America informed Platt of the amount attaching, and he thereupon forwarded to Marshall J. Smith & Co. a statement of particulars as follows:—

"*To the Hibernia Insurance Company of New Orleans:*

The amount attaching on open entry of , 188 , under open policy No. 268, on , per ship , is , at per cent.; premium, $; net, $.

CHARLES PLATT, Jr.

PHILADELPHIA, ."

When reinsurance was effected flat no further advices were given to Platt, nor did he, in turn, forward any statement of particulars, unless, indeed, in the original application the rate of premium or some other detail had been left open, or, as sometimes happened, there proved to be a short interest, so that the whole of the "flat" reinsurance did not attach.

In all the above transactions the risk was manifestly complete as soon as accepted by Platt, acting for the Hibernia. The subsequent statement of particulars was not an integral part of the contract of insurance, but merely information afforded for the convenience of all concerned and to fix the premiums due.

The premiums on reinsurance were all paid to Platt by the North America. His commissions were paid him by the Hibernia out of those premiums. He neither asked nor received any commissions from the North America.

The business done under this policy was so satisfactory and profitable that in a year or two arrangements were made by the Hibernia, through Charles Platt, Jr., for the issuing of other policies. Four were eventually issued as follows:—

No. 277. On goods from Laguayra, Porto Cabello, and Curaçoa to ports in the United States. On the excess of $60,000.

No. 296. On goods from the East Indies to ports in the United States. On the excess of $50,000.

No. 297. On goods from the West India Islands to ports in the United States. On the excess of $50,000.

No. 306. On cotton from ports in the United States to Europe. On the excess of $70,000.

The above policies were all open policies of reinsurance issued directly to the North America. The operative words were:—

"The Hibernia Insurance Company of New Orleans, by this policy of Insurance, do make insurance and cause to be reinsured the Insurance Company of North America, for account of themselves, lost or not lost, at and from Laguayra, Porto Cabello, and Curaçoa to port or ports in the United States, upon all kinds of lawful goods, merchandise, &c., laden on board any good steam or sail vessel, &c., &c."

They also contained a stipulation in the following form:—

"By this policy of reinsurance the Hibernia Insurance Company of New Orleans agree to reinsure the Insurance Company of North America on merchandise and specie on and after April 11th, 1881. This policy is to apply to the excess which said Insurance Company of North America may have on all their various policies over $60,000, and to apply *pro rata* with all reinsurances on same excess, but not to exceed $10,000 by any one steam or sail vessel.

This policy to be continuous until canceled by either party giving twenty days' notice, but without any prejudice to risks pending at the date of cancellation. This policy is subject to such risks, valuations, conditions, and mode of settlement as are or may be taken by the said Insurance Company of North America, notwithstanding anything to the contrary in the within policy, and payment of loss to be made at the same time, as interest may appear, to the extent of $."

Subsequently, by indorsement dated July 1st, 1883, on all the five policies above, it was agreed that they should apply for $5000 instead of $10,000.

The four open policies above mentioned, Nos. 277, 296, 297, and 306, being the property of the North America, passed into the possession of the company. Whenever risks attached upon them, Platt, as agent of the Hibernia, was notified of the fact, and he thereupon sent word to M. J. Smith & Co. When particulars of the risks came in they were likewise communicated to Platt, who thereupon informed M. J. Smith & Co.

It will thus be observed that the North America was dealing

with the Hibernia in reinsuring risks upon both of the classes of policies above referred to.

Nos. 277, 296, 297, and 306 were open policies, properly so called, upon large stated excesses attaching *ipso facto* whenever the North America had at risk sums above such stated excesses. Under these policies the North America disposed of much of the reinsurance on its large risks.

No. 268 was an entirely different class of policy. It was in a certain sense open, but risks did not attach upon it *ipso facto*. It was the policy of Charles Platt, Jr., an insurance broker, acting as agent for the Hibernia, and in order to obtain reinsurance under it, it was necessary for the North America to apply to Charles Platt, Jr., who, acting for the Hibernia, had the power to refuse or accept the risks either flat or on excess, as the case might be. This policy was largely used by the North America in order to obtain reinsurance not covered by the large excess policies. In at least half the cases where reinsurances were applied for and accepted under it, the North America had itself less at risk than the sums upon which the excess policies were stipulated to attach. The very object of having the policy in existence was to afford this accommodation to the North America, and it availed itself very largely of the policy for that purpose.

Towards the close of 1883 the business of marine insurance became less profitable, and the Hibernia became dissatisfied with the existing arrangement. On November 23d, 1883, it gave notice that it wished to cancel all the policies, and the business between the companies thereupon ended. Many hundreds of reinsurances were effected during the life of the policies, a statement of which is contained on pages 22 to 73 of the record.

In 1884 the Hibernia Insurance Company filed the present bill in equity against the Insurance Company of North America, averring in substance, as follows:—

(1.) That Charles Platt, Jr., acting for the North America had applied to the Hibernia to reinsure the North America on the excess of their usual lines, and had represented to the Hibernia that they were to reinsure only the risks that the North America had its usual line upon.

(2.) That the usual line of the North America was a fixed, unvarying sum of $50,000.

(3.) That upon the faith of this representation the Hibernia issued nominally to Platt, but really to the North America, a policy of reinsurance No. 268.

(4.) That thereafter, upon application of the North America, the Hibernia issued directly to the latter the four open policies on excess above referred to.

(5.) That in effecting insurances and reinsurances companies always proceed upon the faith that the reinsured procures reinsurance only on the excess of the usual line carried by it.

(6.) That various reinsurance risks were placed by the North America with the Hibernia under all of the above policies, and particularly under policy No. 268, where the North America had not itself at risk the full sum of $50,000, and that in many such cases losses had occurred, which losses had been paid in good faith by the Hibernia without notice or knowledge of the fact that the North America had not in fact $50,000 at risk.

(7.) That many reports of risks made by the North America were false and untrue, and not within the terms of any of the policies; several specific cases being named.

The prayer was for an account and for the repayment to the Hibernia of such sum as it should be found entitled to.

The Insurance Company of North America in their answer denied the allegations of the bill *in toto*.

(1.) They denied that they had applied to the Hibernia for reinsurance through Charles Platt, Jr., and alleged that Platt as agent for the Hibernia had applied to the North America to place reinsurance through him with the Hibernia.

(2.) They denied that their usual line was $50,000, or that they had any fixed usual line, or that they had authorized Platt to make representation that the Hibernia was to reinsure only the risks that the North America had its usual line upon.

(3.) They denied that the policy 268 was really issued to the North America, but averred that it was issued to Platt only, and that the same was a mere contract of insurance under which the North America could at will obtain reinsurance,

either flat or on stated excess, by applying to Platt therefor; and further averred that the special risks effected under said policy were accepted by the Hibernia without objection or complaint.

(4.) They admitted the issuing of the four open policies on excess, but denied that the effect of them was to preclude the North America from reinsuring in other companies so as to reduce its line as it pleased.

(5.) They denied that in effecting reinsurances there was any custom among insurance companies to contract on the faith that the reinsured procures reinsurance on the excess only of its usual line.

(6.) They denied that all risks placed with the Hibernia were not placed in entire good faith and in accordance with the terms of the policies.

(7.) They denied that any risks reported by the North America were false or untrue, and referred to and set out in detail the facts as to the specific cases mentioned in the bill.

Defendants finally averred that there was a balance due them by the Hibernia of $209.65, and prayed a decree for that sum.

The case was referred to an Examiner and Master, who came to Philadelphia and took voluminous evidence. The officers of the North America were examined on behalf of complainant, and the papers and books of the company exhibited in the fullest and frankest manner. Further testimony was afterwards taken in New Orleans, and a report was filed by the Master in favor of complainant.

The grounds upon which the Master mainly relied in reaching his conclusion were these:—

That policy No. 268, though nominally issued to Charles Platt, Jr., was in reality issued to the North America. That Charles Platt, Jr., had acted throughout the transaction as agent of the North America and not as agent of the Hibernia, and that the clause in his letter of October 11th, 1880, above cited, "of course all risks accepted by me will be such that the North America carries their line on," was authorized by the North America and amounted to a misrepresentation of fact,

material in its nature, of which the Hibernia was entitled to take advantage.

The Master then reviewed the facts of thirteen specific cases of reinsurance effected by the Hibernia, partly under policy No. 268 and partly under the open policies above referred to, in each of which losses had been sustained. As in most of these cases it appeared that the North America had not retained $50,000 at risk, and as that was the amount which the Master was of opinion they were bound to carry, he held that the amount of the various losses paid should be refunded to the Hibernia. He also took exception to certain matters of accounting which in his opinion afforded to the Hibernia just grounds for complaint and redress.

Exceptions were filed to the Master's findings, both of fact and of law, which exceptions were overruled by the court without an opinion, and a decree entered accordingly. From this decree the present appeal has been taken. The appellants earnestly contend that the Master is wholly in error in his conclusions, both of fact and of law, and that the allegations of the bill are wholly unsustained by the evidence.

SPECIFICATIONS OF ERROR.

First.—The court erred in overruling the following exception to the Master's report: That the Master has not furnished with his report, though requested by the undersigned, the minutes of the proceedings held and of the evidence adduced before him, and that said minutes are necessary and would show the whole of the evidence introduced by both parties and considered by the Master, both documentary and verbal, as well as the requests made by the undersigned and admissions made by complainants' solicitor, none of which now appear of record as made, particularly the request of the undersigned that the admission, made voluntarily and spontaneously before the Master on March 12th, 1885, at the closing of the evidence at Philadelphia, in the presence of the president, vice-president, and the undersigned solicitor of respondents, that after

an examination of the books of the company and the testimony adduced, in the case there was not the slightest ground for a charge of fraud, and that the company was vindicated in that respect, be noted and referred to by the Master in his report, and also the full admission of complainants' solicitor, made herein before the Master and at the request of the undersigned, in order to avoid further delay, not only that respondents paid certain claims for losses for which no special proof had been made, upon due proof of loss presented by them to complainants, but further, that Exhibit 132, offered by respondents to show a balance due them of $209.65 at that date, March 12th, 1885, by complainants for losses not yet reimbursed to them, was wholly correct and due as stated therein, and, as the Master added, that there was no dispute as to accounts, and would show that a large number of applications for reinsurance of respondents in hands of complainants have not been produced, though called for and promised to be attached to the particulars of reinsurance.

Second.—The court erred in overruling the following exception to the Master's report:—

That in the "facts" at page 303 of the report the evidence does not show, as stated by the Master, that "to compete profitably," and to meet the wants of customers, respondent was in the habit of accepting the whole amount of the risk any customer applied for on a vessel, "but that, on the contrary, the evidence shows that the respondents only accepted good risks, such as any good and competent marine company in the United States or elsewhere might and would take," and that not a single loss occurred in their transactions with complainants, the risks of which would not have been accepted by any company.

Third.—The court erred in overruling the following exception to the Master's report:—

That the definition of the "usual line," at page 303, by the Master, is not sufficient and may mislead, as, in fact, "usual line" means not an amount fixed absolutely as a limit to itself

by a company to carry or have at risk on any one vessel at any one time, but rather, it means an amount not governed by an inflexible rule, but varying very frequently, and even almost constantly, according to the vessel, the crew, the cargo, the nature of the voyage, the seasons, &c., as the evidence abundantly shows; and, moreover, the evidence shows that respondents in their large business have no absolute and invariable line of risks, they varying and forming their judgment as each case occurs.

Fourth.—The court erred in overruling the following exception to the Master's report:—

That respondents did not, as erroneously stated at page 303, make with various reinsuring companies only "open policy" contracts, but that the necessity of their large business often compelled them to reinsure flat, as well as on an excess, and that it is not correct to say that all "open policies" are necessarily based on a reinsurance of an excess, and these policies, though "open," may as well be made flat up to any amount that may be fixed beforehand between reinsured and reinsurer; the term "flat" meaning a fixed positive sum, not depending on an excess over the usual amount of risk held by the reinsured, but payable by the reinsured without prorating with excess reinsurers at once, provided there be a loss to that extent.

Fifth.—The court erred in overruling the following exception to the Master's report:—

That the report at page 303, previous to the quoting of letters of October 6th and 11th, 1880, on the question of the result of the conference between Marshall J. Smith and the Hibernia Company, does not refer to or give due and proper weight and effect, as it should have, to the evidence of Charles Platt, Jr., concerning the preliminaries and interests and motives of both himself and Smith & Co., as stated in his examination at page 179 *et seq.*; and, in fact, to the whole of the testimony of said witness, who was the witness of complainants themselves.

Sixth.—The court erred in overruling the following exception to the Master's report:—

That the report is erroneous in using, at page 305, the word "usual," which does not exist in the original letter of 11th October, 1880, in the following quoted line.: "Of course all risks accepted by me will be such that the Insurance Company of North America carries their 'usual' line on;" that the testimony of Charles Platt, Jr., referred to at page 305 of the report, does not justify the deduction therefrom—quite the contrary—that neither the letter of Smith & Co. to Charles Platt, Jr., of 6th October, 1880, nor that of Charles Platt, Jr., to Smith & Co., of 11th October, 1880, were written for or on behalf of respondents, nor did they bind respondents, as principals, in any manner, as erroneously inferred and maintained in the report at page 305, said letters having been merely written between the parties, Smith & Co. and C. Platt, Jr., for their mutual benefit and for the benefit of complainants who desired to extend their own business, and neither of said letters being shown to have been communicated to respondents, whose only action in the matter was to have allowed Charles Platt, Jr., to obtain the agency and business of the Hibernia in connection with Smith & Co., also agents of the Hibernia, by enabling said Platt, Jr., to secure for his principals respondents' patronage in its large reinsurance business, following which promise of patronage by respondents the Hibernia issued to Charles Platt, Jr., to carry out and use this advantage it had thus gained, policy No. 268, of date October 13th, 1880, the whole as shown by the two letters themselves, by the terms and conditions and especially the limitation clause on the indorsement of said policy, which has always been in the hands and custody of said Platt, Jr.; by the evidence of said Charles Platt, Jr., from page 179 to page 190; by the evidence of William A. Platt, second vice-president and marine clerk during that whole time, page 98 *et seq.*: and by the evidence of Charles Platt, president for twelve years, and in the company of respondents since twenty-five years, page 253 *et seq.*

Seventh.—The court erred in overruling the following exception to the Master's report:—

That the report is erroneous in its construction, at page 305, of certain expressions in the evidence of Charles Platt, Jr., and in the inference therefrom, merely parts of said testimony being given, and not the whole of it, which, when read in its entirety, shows the very reverse of the Master's conclusion; and the report is also especially erroneous in stating that the word "usual" was used, and also in alleging that the statements of Charles Platt, Jr., therein set forth, were made in the presence and hearing of the president and vice-president, and are not disputed, *first*, because there was no need of disputing what was not admitted, but, in fact, denied by the witness Platt, Jr., and, *second*, because the vice-president, William A. Platt, continuing his cross-examination, at page 192 to page 198, immediately after the examination of Charles Platt, Jr., most emphatically and completely maintained the position and statements of Charles Platt, Jr., who was and is a marine insurance agent, having a totally separate and distinct business and office, and not having then, more than now, any connection whatever with respondents, except as it may occur in the line as insurance agent, and who states that respondents have no interest of any kind in policy 268 more than any ordinary reinsured company has in the business of the company reinsuring it, and that respondents had nothing at all to do with the issuing of said policy nor with its being carried out, more than to know that Charles Platt, Jr., had the authority under it to bind the Hibernia Company, his principal; and to the same effect is the testimony of Charles Platt, president of respondents' company, also taken after that of Charles Platt, Jr., from page 253 to the end thereof at page 263; and, moreover, objection on behalf of respondents was made that no letters of Smith & Co. nor C. Platt, Jr., nor doings, sayings, &c., of theirs, could be used against respondents, unless their privity therewith should be shown, and this was never shown, but the contrary was established; and another objection also made was that no change, addition, or alteration by parol evidence should be made against them, against respondents, in the policies alleged

against them, said documents being full proof of their own contents and of the obligations of each party under the terms thereof.

Eighth.—The court erred in overruling the following exception to the Master's report:—

That the report at page 305 is totally erroneous, *first*, in inferring that which is not only not proven in the least, but which is gratuitously assumed by the Master as a fact against direct evidence to the contrary, that is, that respondent had seen and approved the letters of 6th and 11th October, 1880; and, *second*, in assuming without proof "that the object of policy 268 was to reinsure the excess lines of the Insurance Company of North America usually carried," when the truth is that said policy does not in its terms even mention or hint at the words "excess lines," and when also this totally untenable inference of the Master is contradicted by all the witnesses who knew anything about the subject; and, *third*, in assuming against the terms of the policy itself and against the evidence that said policy 268, though nominally made with Charles Platt, Jr., was to reinsure respondents only on risks in excess of their usual lines; and, *fourth*, in its statement that Charles Platt, Jr., was acting for and representing defendants. (Page 305 of report.) All of which statements and conclusions are not justified in the least either by the contracts, the testimony, or the documentary evidence.

Ninth.—The court erred in overruling the following exception to the Master's report:—

Even admitting the alleged materiality of the alleged representations and of the alleged obligations thereunder of respondents (which they emphatically deny) under the letter of 11th October, 1880, concerning policy 268, nothing in said letter nor in policy 268, which grew out of it, justifies the Master's conclusion that the intention of the parties was to insure an excess above any definite amount or usual lines, no such expression being used, either in the letter or in the policy, and the policy being a contract, and clear and unambiguous in

its language, nothing can be added to it by implication or otherwise to change, alter, or vary it, and respondents have made formal objections to any such illegal alteration or inference; nor is the Master's conclusion justified that policy 268 is the same as policies 277, 296, 297, and 306, the language and terms of the four said last policies being far different from those of 268, the four last being open policies on a stipulated excess made by complainants to respondents themselves directly and attaching and operative *ipso facto*—policy 277, from the Spanish Main to ports in the United States, whenever respondents had at risk an excess over $60,000; policy 296, East Indies to United States, whenever respondents had at risk an excess over $50,000; policy 297, West Indies to ports in United States, whenever respondents had at risk an excess over $50,000; and policy 306, from ports in United States to ports in Europe, on cotton only, whenever respondents had at risk an excess over $70,000—whereas policy 268 in its terms is totally different and distinct, being issued by Hibernia Company to C. Platt, Jr., at request of Smith & Co. and C. Platt, Jr.; it, though an open policy, not attaching instantly nor operating by itself in the event of any stated condition, nor after any excess or any stated amount had been reached, but necessitating for its becoming operative a special application made by respondents directly, or through their several agents in other cities, to Charles Platt, Jr., as agent of complainants, for reinsurance to an amount specially stated in such application, the reinsurance under 268 being thus necessarily special, though it could be made at option either flat—that is to say, absolute and unconditional—or upon an excess over any stated or fixed amount. The terms of excess or of usual lines are not inserted in said 268, and the policy is more general and less restrictive, as it applies "at and from ports in the United States and foreign ports," thus being clearly made and intended for more general purposes than the four last-named policies; and also the reports of shipments and risks taken thereunder are made by Platt, Jr., to Smith & Co., the Hibernia's managers, through whose efforts, combined with those of respondents, part of the reinsurance business of

respondents was given to complainants so that they could use their unemployed capital (see whole testimony of Charles Platt, Jr., and the letters exchanged between him and Smith & Co.); and the Master is also in error in his statement connecting as one undivided act and holding respondents under the several notes attached to the policies, reducing the amount of reinsurance risks to $5000, the contrary being distinctly stated by the only witness to that effect, Charles Platt, Jr., and respondents not being shown, directly or indirectly, to be connected with nor interested in the change made at request of the Hibernia; nor is the Master justified by the evidence in his finding, at page 305, that "these facts lead me to believe the respondent was to retain its usual line when it reinsured with complainant, and the risks complainant was to underwrite were only such as it (respondent) retained its usual line on."

Tenth.—The court erred in overruling the following exception to the Master's report:—

The Master states erroneously, first at page 305, that "the usual line of respondents, as appears from the evidence, is $50,000, that generally they reinsured the excess of $50,000, and that this sum, therefore, was its usual line to be carried in all cases on risks with complainants under the contracts." The evidence shows quite the contrary, especially the uncontradicted testimony of William A. Platt, at page 168 to page 169, and also the uncontradicted testimony of Charles Platt, president of respondent company, from page 253 to page 263. This unwarranted assumption by the Master, of an absolute, fixed, and invariable $50,000 line for the sole purpose of securing such a small reinsurance as the Hibernia's, would be most unbusinesslike and contrary to all ordinary rules of marine insurance, and nothing but the most direct and positive and convincing evidence to that effect could justify the finding of such a condition of contract as a matter of fact fully proven, and to this effect we have the evidence even of Prevost, secretary and business manager of complainants, and of Fourchy and Chalaron, witnesses for complainants, all confirming in effect the statements of Charles Platt, president, and of

William A. Platt, vice-president and marine manager, and of the five presidents of five large marine companies of Boston, New York, and Philadelphia, taken under commissions, that risks are constantly varying in amounts for a number of ever-changing causes and circumstances, and that there is not, nor can there be, an absolute, immutable, unvarying sum at risk which can ever be called a usual line for any company for all vessels, at all seasons, on all voyages, &c., equally and always. The very statement of the Master's starting point of an invariable, usual line of $50,000, which he attributes to respondents, under the penalty of forfeitures of reinsurance on every vessel, at all times, from or to any ports, on all cargoes, is contrary and repugnant to the simplest business notions, and demonstrates forcibly its utter and intrinsic untenability. And the Master states erroneously, at second of page 305, that policy 268 would attach in favor of respondents on vessels and cargo only where the amount of the risks taken by respondents on any one vessel exceeded $50,000, a finding of fact entirely inferential, not substantiated by any evidence, when, on the contrary, the whole evidence, both parol and documentary, adduced in this cause, as well as the most ordinary and simple and businesslike construction and interpretation of a clear and explicit written contract, needing no outside evidence to explain its meaning, point out without doubt that policy 268 had no such restrictions imposed on it as those contained in 277, 296, 297, and 306, and that said 268 covered as to amounts all risks below $50,000, the higher risks being provided for, said risks being very numerous and needing some provision, as seen in the testimony of William A. Platt, and as to ports, it covered those ports which the Hibernia was seeking to reach, and which were not mentioned in the four last special policies, the Hibernia taking and receiving without grumbling or complaining its premiums during three years on numberless applications for reinsurance made specifically and accepted under 268, the applications and particulars all coming to the Hibernia through its agent C. Platt, Jr., and necessarily demonstrating on their face—at least all those made on excess, which were numerous—that the risks carried by respondents were very frequently on sums below and far below $50,000.

Eleventh.—The court erred in overruling the following exception to the Master's report:—

The Master's report from page 305 to middle of page 307 consists in noticing an application to reduce respondents' line on ship "Tonawanda," and quotes thereon letter to Smith & Co. of March 10th, 1884; and in noticing letter of March 2d, 1883, of Smith & Co. to C. Platt, Jr., asking him to notify complainants whenever respondents reduced their line, to which C. Platt, Jr., answered, in letter of March 7th, 1883, that he could not do so, having no facilities nor any information from respondents therefor; and in noticing letter of April 11th, 1881, alleged to have been sent by respondents to complainants for a policy covering an excess of $60,000, which application resulted in policy 277; noticing that on 9th and 10th November, 1881, respondent is alleged to have sent to complainants through Platt, Jr., two other applications for reinsurance policies, one from ports in East Indies and the other from ports in the West Indies to United States, and to apply on excess over $50,000, resulting in policies 296 and 297, forwarded to respondents through C. Platt, Jr.; noticing that on August 26th, 1882, respondents sent to complainants through C. Platt, Jr., an application for policy on cotton from United States to Europe on excess over $70,000, resulting in policy 306; all of which is noticed by the Master to show: First, that those contracts were made through C. Platt, Jr., acting for respondents; second, to show that in all those contracts and letters upon which they were based respondent was to carry its usual line as specified in said contracts; third, to show that those policies attached on the excess stated therein, up to $10,000, provided the risks were to and from the ports mentioned; and the Master concludes that when the two conditions of usual lines and ports mentioned concur, these policies apply, because, says he, "otherwise respondent could have reinsured on vessels of every character, seaworthy or not, and under circumstances the most hazardous, and could have reinsured the whole risk to save itself from loss," which was never contemplated by the contracts; and, as all the policies and propositions for policies with complainants appear to have been

made through C. Platt, Jr., and copies of all applications and notices were transmitted to Smith & Co., who appear to have acted for complainants, and all demands for losses on risks reported were sent by respondent through Platt, Jr., to complainant, it appears, therefore, that C. Platt, Jr., acted as agent of respondent, and Smith & Co., in New Orleans, as agent of complainants, and as a further consummation of this finding a demand was made on Platt, Jr., to report particulars of risks as soon as taken, and this he could not do, as per his letters to Smith & Co. of September 15th, 1883, and of June 15th, 1883; and quotes from letter of June, 1883, that from July 1st, 1883, amounts of reinsurance by Hibernia will be reduced to $5000, as requested by letter of Smith & Co., of 9th June, 1883, showing, concludes the Master, that C. Platt, Jr., acted for respondents, and Smith & Co. for complainants, and further aids and supports the conclusion by the fact that complainant, on November 23d, 1883, notified respondent, through Platt, Jr., that it wished all its open policies with respondent canceled; all of this satisfying the Master that the business was for the respondent and that all that Platt, Jr., did was with its knowledge, approval, and direction. First noticing that letters of 11th of April, 1881, and of September 15th, 1883, are not in the record and do not appear to have ever been filed, and admitting, though not having them before him, the applications through C. Platt, Jr., by respondents to Hibernia (but not the alleged letters, which were never sent and are not in evidence), for open policies on excess Nos. 277, 296, 297, and 306, and admitting the letters on record exchanged between Smith & Co., and Platt, Jr., which have been cited and from which extracts have been given in the report, it does not follow, as the Master erroneously infers and concludes, that Platt, Jr., was the agent of respondents and acting for them and binding them by all his acts, doings, and sayings. On the contrary, Chas. Platt, Jr., Wm. A. Platt, and Chas. Platt, president, all concur in saying that such was not the case; that respondents had no interest whatever in the matter and did not correspond nor interfere concerning it, nor were they consulted, nor were they shown letters, nor did they give advice,

approbation, or assent to any of the acts of either the Hibernia or Smith & Co. or C. Platt, Jr. concerning this reinsurance business, except when and in so far as their own interests as reinsured were concerned, and then strictly for their own (respondents') interests; that respondents, merely as a favor to C. Platt, Jr., and to his friends in New Orleans, for the brokerage fees they might make out of it and for the premiums that might accrue to C. Platt, Jr.'s principal, the Hibernia, gave them a share of their large business and extensive patronage. The testimony explains fully, well, and satisfactorily why all the business was conducted through Platt, Jr., it being because of its convenience, its simplicity, the advantage it might bring in brokerage fees to Platt, Jr., and because, since the issuing of policy 268, C. Platt, Jr., had been, with his friends Smith & Co., the open and recognized agents of the Hibernia in all this reinsurance business allowed and promoted by respondents at the very request of the Hibernia, made through Smith & Co. and Platt, Jr., both agents of the Hibernia; and for these reasons it had been customary and was very natural that all communications should pass through the hands of Platt, Jr., not because he was respondents' agent, but because, on the contrary, he was complainants' agent.

When respondents wished direct open policies on excess they so requested and obtained them in their own name and not under a cover never needed. In fact, an agent of the Hibernia was needed in a policy such as 268, where no excess was stipulated as being the beginning of an *ipso facto* risk, and where, moreover, a direct application for reinsurance was required to effect the same and to render the policy operative. The letters quoted by the Master, as well as those not quoted by him and which have been overlooked—to wit, August 28th, 1882, September 4th, 1882, September 8th, 1882, September 14th, 1882, September 15th, 1882, June 18th, 1883, June 9th, 1883, November 23d, 1883, as well as all the other letters filed herein—instead of leading in the least to the inference that Platt, Jr., was the respondents' agent, lead, in fact, and when taken either separately or altogether, to the contrary inference, that he was the agent of the Hibernia, which latter, even in

the matter of the cotton policy, could not obtain from respondents that they deviate from their policy of reinsuring not lower than a certain sum—say $5000; and respondents, furthermore, not allowing the Hibernia the privilege of lowering its $10,000 reinsurance on excess of $70,000 *pro rata* of the lowering, so far as the respondents might lower their own risks, clearly showing that at that time the Hibernia did not have the pretension it has now that because their reinsurance policies attached over $50,000, or $60,000, or $70,000, therefore the reinsured respondents must carry the whole amount to destination and can never reinsure with other companies to reduce their risks; and, finally, letter of Platt, Jr., to Smith & Co., of November 23d, 1883, in which he states, "I have given notice to Insurance Company of North America that the Hibernia desires to cancel their open policies, in accordance with their terms, from this date, and I will accept no new business from to-day," which letter clearly indicates that he gave notice to the respondents and acted not for the latter, but as agent and representative of the Hibernia and at their request. The letter of June 9th, 1883, from Smith & Co. to Platt, Jr., is also to the same effect, and the whole evidence, even that of Prevost, secretary of the complainants, in his cross-examination, shows that the whole brokerage fees were paid to Smith & Co. and Platt, Jr., out of the premiums earned by the Hibernia, and which they were allowed to keep, and it follows necessarily that both Smith & Co. and Platt, Jr., were the Hibernia's brokers and representatives and not those of respondents. As the testimony on this is direct, positive, and uncontradicted it should be held as decisive of the question, and in not giving proper consideration, weight, and effect to the evidence adduced the Master is wholly in error in his decision on that point of agency, he assuming as facts that which was never proven, wholly neglecting and overlooking the facts proven in favor of respondents on the question at issue, the whole argumentation of the Master begging the question, presuming fraud as a close possibility—a matter which the law forbids to presume in any manner and which the law of ordinary business equally forbids to be and which cannot be

presumed in a respectable and flourishing insurance company—referring as proofs of a fact to acts of complainants which, as to defendants, could never be proof against them, as one cannot manufacture his own evidence to suit himself, and said argumentation being altogether groundless, erroneous, incorrect, and not flowing from the premises and true state of facts as developed by the evidence.

Twelfth.—The court erred in overruling the following exception to the Master's report:—

From the middle of page 307 of the report until the last paragraph at page 309 the Master states that complainants inquired into and knew of respondents carrying on vessels lines of risk far below the alleged and pretended usual line of $50,000, in which cases the losses had been paid by complainants, and he puts to himself the question whether respondents had a right so to do under the terms of the contracts, and quotes several cases as to material misrepresentations, and interprets the contracts in this manner: That, according to him, the complainants were bound on the marine risks only when respondents carried their alleged usual line, which he assumes to be invariably $50,000, and that complainants were not bound whenever respondents failed to carry $50,000, unless previous notice of such fact was given, and the risk after such notice accepted, and he quotes authorities on misrepresentation, even when not fraudulent, up to the last paragraph of page 309.

The first error of the Master is in misinterpreting the several contracts, which are clear and easily understood in their terms and are not really susceptible of nor amenable to any interpretation by means of outside evidence, none such being necessary, and the grave error of the Master consists in this misinterpretation and want of consideration of the whole evidence, and erroneously considering and commenting and passing upon part of the evidence, and entirely overlooking the rest thereof in determining, as a matter of fact, that policy No. 268 was that of respondents, that Platt, Jr., was their agent, and that their so-called usual line was positively and invariably on all vessels, voyages, cargoes, &c., exactly $50,000, and that

through Platt, Jr., and Smith & Co. they had so informed complainants, and that therefore, in all cases where respondents had taken risks below $50,000, and had reinsured under No. 268, and, having misrepresented the facts, the risks never attached, and they must return to complainants the several amounts of losses paid by them in such cases, less the premiums. The contracts are each separate and distinct, and must be considered each one by itself. There is no reason in the world to club them together in one mass, and then draw forced and unnatural inferences therefrom. Policy 268 was made general in its terms, from and to all ports, and was not limited as to amounts nor as to the method of reinsuring, whether flat or on a stated excess; was not an open, self-operating policy, but could only be put in force by specific applications for reinsurance in each and every case thereunder, whether the application was flat or whether on an excess; was issued to Charles Platt, Jr., a marine broker, by the Hibernia after conference with its friends and agents here, Smith & Co., for the mutual benefit of the Hibernia, Smith & Co., and Platt, Jr.; all the brokerage being paid by the Hibernia, as well proven. It appears, though, that the Hibernia, through Smith & Co., its agents here, limited Platt, Jr., to reinsurance with respondents, but for its own convenience or security if it did not wish to extend its operations further; and this line, taken for its own and sole benefit, could have been ended at any time by it and its agent, Platt, Jr. allowed to reinsure other companies to a large amount, and with all this respondents have no connection, interest, nor even knowledge, as shown in evidence. Why then should the Master call Charles Platt, Jr., the agent of respondents, and not the agent of the Hibernia, as he really was, any more than he would or could call agents of respondents the numerous other companies in Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, which did and do yet for respondents the same identical business of reinsuring them as did the Hibernia through Platt, Jr.? The facts do not warrant any such distinction or conclusion of the Master. As to a knowledge by the Hibernia, from the very inception, in 1880, up to the very middle of 1883, that re-

spondents very frequently carried lines less than $50,000, their very business knowledge should have taught them this, and they cannot now be heard to plead their own ignorance, if ignorance it ever was.

An insurance company takes what good business it finds, and if the amount of risk is too high it reinsures. As experts in the business the Hibernia should have known, and they did know, and were informed as a matter of fact, through both of their agents, Smith & Co. and Platt, Jr., that under policy 268 they had reinsured respondents on lines carried by them far below the alleged standard line $50,000, say on excess of $45,000, $40,000, $35,000, $30,000, $25,000, and even less. This is conclusively shown, and without doubt, by the very applications for reinsurance and particulars thereof, all under 268, sent to them by their agent Platt, Jr., through their other agents Smith & Co., and the Hibernia never raised a voice or interposed an objection until it happened that they made less money than they had anticipated out of the three years' transactions, though the evidence shows that the complainants received from respondents as much and even more premiums than they paid losses. I refer the Master to, amongst others, steamer Avlona, X 2, policy 268, on excess over $25,000, cargo, October 18th, 1881; bark Impi, X 5, policy 268, on excess over $30,000, wheat, August 28th, 1882; ship Obi, X 1, policy 268, on excess over $25,000, sugar, June 11th, 1881; and, in fact, if complainants had offered in evidence all their particulars of reinsurance under policy 268, it would be found that it is clearly demonstrated that in innumerable cases complainants had knowledge and information through Smith & Co., through Platt, Jr., through the applications for reinsurance and the particulars sent to them in so many cases under policy 268, and especially through the evidence of William A. Platt, second vice-president, and the marine clerk, taken from the books of respondents before the Master, and through the testimony of the five marine insurance presidents, taken under commissions, that complainants could not help knowing, and must have known, and could not have inferred otherwise from the above-cited reinsurance on less than excess over $50,000, that respond-

ents insured under policy 268, by special applications, all those risks which, either owing to their being less than $50,000, $60,000, or $70,000, or owing to their not being vessels to or from ports covered by the open policies which attached *ipso facto*, and were self-operative, could not be reinsured otherwise with complainants, and of this the latter could not help being and were cognizant and assenting thereto, and it thus appears that the alleged usual lines of respondents did vary as those of any other company in the world, and that the Hibernia knew it. The other policies, 277, 296, 297, and 306, are self-explanatory, being issued directly to respondents, and were also self-operative by the mere fact of respondents carrying on any one vessel over $50,000 or $60,000 or $70,000 on the voyages specified therein. They did not cover so much ground as policy 268, and only required of the respondents to notify complainants through their chosen agent, Charles Platt, Jr., of the probable amount of total risk, to be followed as soon thereafter as possible by the particulars.

The second error of the Master is in assuming that respondents did not fulfill their obligations under the contract to the letter, when the uncontradicted evidence clearly shows that they did fulfill honestly and completely all their obligations as a reinsured company under the several contracts cited; that they made true and proper representations, gave the proper and true particulars and notices, paid the proper premiums, and settled all losses for the best advantage of all parties concerned, and especially is it proven by the testimony that they did in effect and in every particular carry at their own risk their usual line on each vessel in each particular voyage, except in the two cases of the Budstikken and the Adele, which are fully explained, having happened by accident, and which, being stated in the interrogatories to the most expert marine insurers of New York, Boston, and Philadelphia, were considered as cases that might happen accidentally to any company, and this carrying of their usual line in every instance on each vessel is shown specially from respondents' books examined by the Master, in the testimony of William A. Platt, and of Charles Platt, president, and so much was the good faith and truthful-

ness and correctness of respondents then seen and made apparent that near the last day of the examination, in the presence of the president and vice-president aforesaid and of the undersigned solicitor, Mr. Sansum, solicitor for complainants, deemed it his duty to call the especial attention of the Master to the fact that he was satisfied there was no fraud that could be charged against the respondents; that they had shown the fairest and most honest dealings, and had kept their books in the clearest and most correct manner possible, which statement the Master is now called upon by the undersigned to make explicitly in his report to the court, it being set forth therein.

The third error of the Master is one of law when he assumes that respondents were bound in law and in equity, under policy 268, to carry a usual line, which line, though they did actually carry with the Hibernia, they maintain they are not obliged to carry at all, they pretending and maintaining, as a matter of right, that they may reinsure at pleasure even up to the whole amount of their risk, provided there be no fraud, and, on the excess policies, that they may reinsure with other companies below the excess without vitiating the reinsurance above said stated excess policies. As to the law quoted by the Master, it is quoted in error in that it is wholly inapplicable to the facts of this cause.

Thirteenth.—The court erred in overruling the following exception to the Master's report:—

The Master in his report, from page 309—"usage as applicable to contracts"—to page 310, refers to authorities on the subject and refers to testimony of Fourchey and Chalaron, taken on behalf of complainants, to the effect that they would not pay a loss reinsured when the reinsured carried no risk; states that this is the custom and that it is not disputed by any contradictory evidence; that he does not find evidence to sustain respondents' view; that Charles Platt, Jr., was the agent of complainants and that his knowledge was their knowledge; argues on page 310 and page 311 in an endeavor to show that Charles Platt, Jr., could not be and was not the agent of the Hibernia, stating the proposition as leading to an absurdity,

and concludes by asserting that "the evidence makes it very clear that policy 268 was made for the benefit of respondents only."

Respondents respectfully suggest that the Master is in error on the first proposition, as the question to be decided is not one of usage, but clearly and solely one of interpretation and effect of contracts, and therefore the law quoted finds no application, and that, even if it were considered a question of usage, the Master is yet in error, having merely examined the testimony and opinions of Fourchey and Chalaron, witnesses of complainants, and in not having examined, referred to, and given its full and due weight to the pointedly contradictory opinion of five experts, presidents of the largest marine insurance companies of the leading cities—of New York, Boston, and Philadelphia—some of these the neighbors and all the competitors of respondents, to wit: Ransom B. Fuller, president of Boston Marine Insurance Company; Henry D. Sherrerd, president of Insurance Company of the State of Pennsylvania, of Philadelphia; Thomas C. Hand, president Delaware Mutual Insurance Company of Philadelphia; W. J. Comes, president Commercial Mutual Insurance Company of New York; Ferdinand Motz, president of the Great Western Marine Insurance Company of New York, who all state that, as in the case of the "Obi" put them in the interrogatories, it would not be reasonable for the Hibernia to think or infer that the respondents carried more than $25,000 on that voyage; that it is not customary for companies to bind themselves to an invariable amount as to risks to be carried by them, and as to the payment of a loss in the cited case of the "Adele," where it was found that at the time of the loss and by accident the flat reinsurance covered more than was actually on board, they all declared, having been interrogated thereon, that the flat reinsurers properly paid the loss and were so bound. In fact, their evidence, taken under commissions, maintains fully and completely all the points as to usage and interpretation and effect of contracts, &c., asserted by respondents in their defense against the claim of complainants, and this overwhelming testimony as to weight and authority should be held superior to any

other produced here of estimable men, it is true, but who never have had such an extended and complete experience.

That the Master is in error on the second proposition, that there is no evidence to show that Platt, Jr., was agent of complainants, and that his knowledge was theirs, and that he could not be their agent, the reasons for this assignment of error having been fully stated hereinabove, the undersigned believing and respectfully setting forth that, in his judgment, the Master's argument is unfounded—in fact, proves nothing, and defeats itself; and as to the conclusion of the Master that the evidence shows that policy 268 was made for the benefit of respondents only, the undersigned begs leave to think and assert that in his judgment the whole evidence properly weighed shows exactly the contrary, the reasons of this assignment of error having been hereinabove fully set forth.

Fourteenth.—The court erred in overruling the following exception to the Master's report:—

From the preceding exceptions, if well founded, the Master is necessarily in error, and so he is, in the opinion of the undersigned, on all the special cases from page 27 to page 47 of the report, thirteen in number; and, the reasons for each allowance being detailed in each, the undersigned, for brevity, now sets forth that there is error in the Master's decision and finding of amounts in each and every case when he has found for complainants, and he will give a special assignment of error in such cases only as he may think are different from those where the general evidence and the law of contracts are involved. First, pages 313 to 317 of report, as to ship "Obi," the Master is in error, not only because of the reasons alleged in the preceding objections of the undersigned, but because, also, he erroneously assumes that due notice was not given to complainants, and that there is no evidence of the intention of respondents so to do, when the contrary is the case, respondents having acted therein in the usual manner and custom of marine companies; and the Master is also in error when, he claims that, under the circumstances of the case, respondents should have given complainants' reasons for reducing.

Steamer "Avlona," page 312 of report:—

The whole statement of the Master here is incorrect and erroneous, and especially erroneous in the alleged fact that complainants had no knowledge that the respondents carried less than $50,000 on this voyage, and also in the alleged fact that respondents endeavored to and did obtain reinsurance with the Hibernia after knowledge of the loss and damage was known to them and published. The evidence discloses no such state of facts, but quite the contrary.

Bark "Yorkshire," page 313 of report:—

All error under the foregoing general exceptions, no special exceptions being deemed necessary in this case.

Bark "Impi," page 313: Same as "Yorkshire," the report itself setting forth knowledge of complainants in this special case.

Bark "Budstikken," page 313 of report:—

The error of the Master is, as usual, his mistaken idea of an absolute and invariable $50,000 risk on every vessel on every voyage on the part of respondents. As to the other facts stated, the evidence discloses that everything was done and notice given in due course of business and as promptly as possible, and the prorating of the loss was properly made, as well as it could be under the contracts of reinsurance of respondents with complainants, and if it be claimed that the *pro ratum* was not correct, the Hibernia, who profited by it, cannot be heard to complain, having no interest, and, moreover, this point having been raised only in argument here and not in Philadelphia, where alone it could have been explained if error there was, which is denied, it is now too late to make it, complainants being estopped. The fact of an accidental non-interest in the risk on the part of respondents has been fully and satisfactorily explained, the position of respondents being supported by the evidence taken under commissions. The loss was due and properly paid by the complainants as reinsurers, the Master being in error as to the facts and the law in this case.

Steamer "Peruvian," page 314: Same errors as alleged in "Yorkshire" above.

Barks "Ocean" and "Skerryvore," page 314 of report: Same errors as alleged in bark "Yorkshire."

Bark "Adele," pages 314 and 315 of report:—

The statement of Master is erroneous, and the facts were fully and correctly stated in the evidence of William A. Platt. The notices and information of loss and all other necessary particulars were duly given at a proper time, as soon as possible, to the reinsuring companies, including complainants.

Barks "Etimologia" and "L. E. Cann," page 315: Same errors as alleged for bark "Yorkshire."

Ship "Matchless," pages 315 and 316 of report:—

This statement is erroneous in fact and in law. The amounts to be paid were duly and properly prorated and paid both in equity and under the contracts between complainants and respondents, and even were the prorating improper, it is too late to urge it now, as it should have been urged in Philadelphia, and not here merely and for the first time in argument, respondents being taken by surprise after having called on complainants to disclose in Philadelphia all that they wanted to know, the whole source of information being there, and there being no means here of proving the correctness of the *pro ratum*. The complainants are, therefore, estopped from all claim on this ship, if any they really ever had, which is denied, and there is error in the allowance of this claim by the Master.

Ship "Adam Simpson," page 316: Same errors of the Master as alleged for "Matchless" hereinabove.

Fifteenth.—The court erred in overruling the following exception to the Master's report:—

There is error in not allowing claim "B 7" of respondents for a balance of $209.65, as, in addition to the admission of complainants stated by the Master, a further admission was made to save delay as to the correctness of the claim and as to its being allowed as good and regular and due, this admission being probably in the minutes of the proceedings had before the Master.

Sixteenth.—The court erred in overruling the following exception to the Master's report.

There is no equity in the claim of complainants nor in the award of the Master in their favor, as this suit merely claims repayment of the losses, and does not offer a repayment of premiums on the numerous other cases of risk below $50,000 under policy 268, in which there was no loss, and complainants yet keep the premiums, the evidence showing that the total amount of premiums received by complainants is larger than the total amount of the losses paid by them. Complainants will thus become rich at the expense of respondents, who, under the decision of the Master, will have run all the risks, whilst complainants, without any risks at all, since all contracts below $50,000 are invalidated by the Master, will have reaped all the benefits of the premiums paid without supporting any of the losses.

Seventeenth.—The court erred in overruling the following exception to the Master's report:—

One fundamental error of the complainants and the Master seems to be that they have assumed erroneously that it is the reinsured who is benefited, whereas the contract is, in its very nature, strictly commutative, doubtless; and if some one is benefited specially it is the reinsurer, who cannot leave his capital idle and who is always in search of customers for its employment. Such being the law of business, the Master is finally in error in this, that he has not applied in his findings that complainants, in order to recover must prove their allegations and charges clearly, conclusively, positively, and without the least doubt—a proof that they have not made, the undersigned respectfully contends; and he is furthermore in error in his examination and report as to the questions of fact and of law in so far as they concern respondents, who have not only successfully, as the undersigned believes, defended themselves against attack, but who have proven affirmatively the allegations of their defense, and who are therefore entitled to a dismissal of the bill of complaint and to a judgment in their favor for the balance due them.

Eighteenth.—The court erred in overruling the following exception to the Master's report:—

The Master is finally in error in this, that he has not applied in his findings the law that complainants, in order to recover, must prove their allegations and charges clearly, conclusively, positively, and without the least doubt—a proof that they have not made, the undersigned respectfully contends; and the Master is furthermore in error in his examination and report as to the questions of fact and of law in so far as they concern respondents, who have not only successfully, as the undersigned believes, defended themselves against attack, but who have proven affirmatively the allegations of their defense, and who are therefore entitled to a dismissal of the bill of complainants, and to a judgment in their favor for the balance due them.

Nineteenth.—The court erred in overruling the following exception to the Master's report:—

That the Master erred, even admitting that his views of the evidence and of the law and his conclusions are correct, in so far as he has expressed them in his report, in this, that if all the risks reinsured and taken under policy No. 268 below the Master's assumed usual line of $50,000 are void and contrary to the contract, as he declares, then he should have declared void and inoperative all the other risks below $50,000 in which no loss had occurred, and in which the complainants benefited by the premiums paid to them, and that in order to do so it is necessary that a full and complete account of all the risks under all and each of the policies be made by him, and the respondents credited with the premiums paid by them in all the cases where no loss occurred, as well as in those where a loss occurred, and was paid by complainants, the report of the Master being incorrect and incomplete as to the facts by the examination made by him of respondents' books, and it being believed and here asserted by exceptants that a full examination and report would show, as well as the evidence on the same does now partly show, that they are entitled—even admitting the views of the Master as correct—to

a return of a larger sum for unearned and untrue and erroneously paid premiums than the sum allowed to complainants by the Master.

Twentieth.—The court erred in entering a decree in favor of the complainants for $27,986.79 with interest from August 13th, 1884 (Record, pages 337 and 338), and in not dismissing complainants' bill.

ANALYSIS OF THE SPECIFICATIONS OF ERROR.

The court erred in dismissing exceptions to the Master's report, which were filed to the following effect:—

1. The Master erred in failing to file the minutes of the proceedings showing an admission by counsel for complainant that there was not the slightest ground for a charge of fraud, and that the North America was vindicated in that respect; and also an admission that the sum of $209.65 was due to complainants.

2. The Master erred in reporting that in order to "compete profitably" the North America was in the habit of accepting the whole amount of any risk that a customer applied for, the evidence showing that the North America only accepted good risks.

3. The Master erred in his definition of the "usual line" as an amount fixed absolutely, whereas the evidence shows that it varies in every case.

4. The Master erred in treating all the policies, including No. 268, as open policies on excess, whereas No. 268 had not that character.

5. The Master erred in failing to give due weight to the evidence of Charles Platt, Jr., touching the original conversation between himself and Marshall J. Smith & Co. as to the issuing of policy No. 268.

6. The Master erred in the construction of the clause in the letter of Charles Platt, Jr., of October 11th, 1880, and in holding that the North America was in any respect bound by any statements in that letter.

7. The Master erred in finding that the North America authorized or had any knowledge of the statements made in said letter of Charles Platt, Jr., of October 11th, 1880, and in permitting the same to be introduced in evidence to vary the terms of the contract of insurance.

8. The Master erred in assuming that the North America had seen and approved the letters of 6th and 11th October, 1880; in assuming without proof that the object of policy No. 268 was to reinsure the excess lines of the North America usually carried; in assuming that the policy was issued to reinsure the North America on the risks in excess of their usual lines only; and in finding that Charles Platt, Jr., was acting for the North America and not for the Hibernia.

9. The Master erred in admitting the letter of October 11th, 1880, in evidence to vary the terms of policy No. 268, which was a contract clear and unambiguous in its language, under which insurance, either on stated excesses or flat, could be obtained by the North America at will on application to Charles Platt, Jr., acting for the Hibernia.

10. The Master erred in finding that insurance companies have any fixed usual line; and in finding that the usual line of the North America was $50,000.

11. The Master erred in finding from all the evidence that Platt was acting as the agent of the North America and not of the Hibernia.

12. The Master erred in finding that the North America had no right to place risks with the Hibernia unless it itself retained $50,000 at risk; and particularly in finding that the Hibernia had not notice, from the form of the application made by the North America, that the latter was not itself retaining in every case $50,000 at risk.

13. The Master erred in finding that there was any usage or custom proved that a company reinsuring a portion of any risk, should itself retain any fixed, invariable amount upon the vessel.

14. The Master erred in finding that any amounts were due to the Hibernia in the thirteen specific cases named.

15. The Master erred in not allowing to the North America the $209.65 admitted to be due.

16. The Master erred in not reporting that the bill should be dismissed for want of equity, because the complainants do not offer a repayment of premiums in the numerous cases in which the North America retained at risk less than $50,000 where no loss was sustained.

17. The Master erred in finding that under the contract the company reinsured benefited only, whereas the contract was strictly commutative.

18. The Master erred in not reporting that the bill should be dismissed because the allegations and charges of the complainant were not clearly, conclusively, and positively proved.

19. The Master erred in not finding, even if his other views were correct, that all risks where the North America did not retain $50,000 were void and contrary to the contract; and in not stating a full account, so that repayment might be made to the North America of all premiums paid out by it on account of such risks.

20. The court erred in entering a decree in favor of complainants and in not dismissing the complainants' bill.

BRIEF OF ARGUMENT FOR APPELLANTS.

The questions raised in this case are mixed matters of fact and of law. Fortunately the material facts as developed by the evidence are not materially disputed. The contention of the appellants, however, in substance, is that the Master has failed in his report to give due weight to much of the most material testimony, and that the facts as a whole are not fully and fairly stated; and further, that his conclusions are based upon a total misapprehension of the true nature of the contracts involved.

The purpose of this brief will be, therefore, in the first place, to call specific attention to all the material portions of the testimony, and to endeavor to lay before the court a full and precise statement of the facts as they are shown to have actually occurred. The particular findings of the Master will be considered in detail, and the evidence relied on by him to

support them will be examined and analyzed. This exposition and examination will, it is confidently believed, satisfactorily demonstrate the serious errors of fact into which the Master has fallen. At the same time the attention of the court will be called to the true construction and effect of the contracts and agreements entered into, as construed by law and the customs of insurance. In this respect, also, it will be shown that the Master has entirely erred.

Several good and sufficient defenses to the complainant's case will be incidentally stated even upon the supposition that the facts are fairly stated by the Master, and his construction of the contracts a just and proper one. These defenses are not, however, mainly relied upon, inasmuch as it is conceived to be clear that the position assumed by the Master is untenable.

In arranging this brief it is not proposed to follow the assignments of error *seriatim*. Such a course of proceeding is rendered difficult, if not impossible, by the complexity of the various questions involved. It has been deemed most conducive to clearness and conciseness of statement to arrange in order the main positions assumed by the Master, and to consider these separately, showing as to each the errors into which the Master has fallen and the bearing of the whole evidence upon them.

A careful analysis of the Master's report will serve to show that the grounds upon which it is based are substantially as follows:—

1. That policy No. 268, under which most of the reinsurances in question were effected, was in reality issued directly to the North America and not to Charles Platt, Jr., and that Charles Platt, Jr., acted throughout all the transactions in regard to the issue of that policy, and the effecting of reinsurances thereunder, as the agent of the North America and not as the agent of the Hibernia.

2. That the North America made or authorized a representation to the Hibernia, in connection with the issue of policy No. 268, that no risks would be effected upon that policy except those upon which the North America had its "usual line,"

and that by this representation the North America bound itself in all cases to retain its usual line.

3. That every insurance company has, as its usual line, a fixed, unvarying, definite amount which it is invariably accustomed to carry, and that in the case of the North America the usual line was $50,000.

4. That the Hibernia issued policy No. 268 upon the faith of the representation made by the North America as aforesaid, and confiding and believing in the truth thereof.

5. That there is a custom or usage among insurance companies effecting reinsurance, that the reinsured company shall always retain upon each vessel a certain definite fixed sum known as its "usual line."

6. That the Hibernia accepted risks under said policy, in many cases, in ignorance of the fact that the North America was not carrying $50,000 on the vessel, and in certain instances paid losses on the same in like ignorance; and further, that the Hibernia had no means of knowledge in such cases as to the amount of risk retained by the North America.

7. That the policy on excess, viz., No. 297, was issued by the Hibernia under the same understanding as to the retention by the North America of its usual line, as in the case of policy No. 268, or upon the faith of the custom above referred to.

From these premises the Master concludes that in all cases where the North America did not have $50,000 at risk the reinsurances were improperly placed with the Hibernia, and that where in such cases the Hibernia paid losses it is entitled to recover back again the sums so paid. Out of many hundred vessels reinsured during the period intervening between 1880 and 1885, he reports specifically thirteen in which the Hibernia is, for the reasons above stated, entitled to recover back the amounts paid out. The particulars of these cases are stated at length. In two of them the Master notes the fact that the reinsurances were so heavy as to leave to the North America no line for itself upon the vessel. The Master also takes exception to certain matters of accounting on the part of the North America, by reason of which he decides that the Hibernia is entitled to a recovery.

The North America denies that any of the conclusions above found by the Master are warranted by the evidence.

1. The North America explicitly denies that policy No. 268 was in reality issued to the North America, and not to Platt, but avers, on the contrary, that such policy was issued to Platt only, and that the North America had no interest therein, and further, that in all of the transactions in connection with such policy, Platt acted as the agent of the Hibernia, and not of the North America, and particularly, that the reinsurances effected thereunder were effected by Platt acting for the Hibernia. In this connection the character and legal effect of policy No. 268 will be considered.

2. The North America denies that it ever made or authorized any representation to the Hibernia, in connection with the issuing of policy No. 268, to the effect that it would always carry its usual line, but avers, on the contrary, that it never made any such representation, nor did it authorize any person to make such representation for it.

3. The North America denies that insurance companies have as a usual line any fixed, unvarying, and definite sum, and denies particularly that its own usual line is fixed at $50,000, or that it has any fixed usual line.

4. The North America denies that the Hibernia issued policy No. 268 upon the faith of any representation as to the retention by the North America of any given amount of risk on any vessel, and further contends that the alleged representation, even if made, would not have been binding upon it, inasmuch as it was promissory merely, and not a misstatement of any existing fact or facts.

5. The North America denies that there is any usage or custom among insurance companies reinsuring with each other, that the reinsured company shall retain any certain, definite, fixed sum at risk.

6. The North America avers that at the time the risks were effected under policy No. 268 the Hibernia had express notice from Charles Platt, Jr., and otherwise, that the North America, in many instances, was not carrying $50,000 in such cases, notwithstanding which it accepted the risks without objection,

which conduct on its part indicates a construction of the contract, by its officers, entirely in accord with that put upon it by the North America, and acts in addition as an estoppel.

7. The North America explicitly denies that the policy No. 297, on excess, was issued with any understanding as to the retention by the North America of any stipulated sum, or on the faith of any representation, or of any custom or usage to that effect.

Finally, the North America contends that it acted in perfect good faith in all its transactions with the Hibernia; that in every case it intended to retain, and did retain, a reasonable amount of risk, except in two instances, where by accident the reinsurances covered the whole risk. That such accidents are unavoidable in the common run of business, and are so recognized by insurers generally. That the alleged errors in accounting can all be satisfactorily explained, and that the views of the Master in regard to them arise out of a misapprehension by him of the principles and contracts involved.

The points above noted will be considered in order.

The particular attention of the court is directed to the important evidence of the following well-known experts in the insurance business:—

W. J. Comes, president of the Commercial Mutual Insurance Company of New York. (Record, page 267.) Ferdinand Motz, president of the Great Western Insurance Company of New York. (Record, page 269.) Ransom B. Fuller, president of the Boston Marine Insurance Company. (Record, page 273.) Henry D. Sherrerd, president of the Insurance Company of the State of Pennsylvania, of Philadelphia. (Record, page 279.) Thomas C. Hand, president of the Delaware Mutual Insurance Company of Philadelphia. (Record, page 281.)

The depositions of these witnesses are directly in point upon every question raised in this controversy. For some extraordinary reason they were wholly disregarded by the Master. That the depositions were properly before him appears by his formal certificate. (Record, pages 76–77.) The earnest attention of the court is directed to them.

Policy No. 268 was not issued to the North America, but was, on the contrary, issued to Platt only. The North America had no interest therein. In all of the transactions in connection with said policy, Platt acted as the agent of the Hibernia and not of the North America. The character and effect of that policy was such that it did not *ipso facto* attach to any risks, but only to such as were submitted to Platt by the North America, and accepted by him on behalf of the Hibernia as proper risks under the policy.

In order properly to understand the nature of the transactions involved in this case, it will be necessary to consider the precise circumstances under which they were entered into. Charles Platt, Jr., is an insurance broker of Philadelphia, having a business separate and distinct from that of the Insurance Company of North America, and having a separate office. (Record, page 185.) He is not in any manner connected with the marine insurance business carried on by the North America. (Record, page 194.) In the early fall of 1880 Marshall J. Smith of New Orleans, representing the Hibernia Insurance Company, was in Philadelphia, and called upon Platt at his office. A conversation took place between them, as to which Charles Platt, Jr., testified as follows:—

"Marshall J. Smith, of Marshall J. Smith & Co., was here in the city, and he asked me if I could make an arrangement *to get business for the Hibernia Insurance Company.* I told him I didn't know, but I would see if the Insurance Company of North America were willing to reinsure with the company, and let him know. He said that he, in the meantime, would go back to New Orleans and write to me on the subject."

(Record, pages 179, 180.)

On cross-examination the witness further testified, as follows:—

"The facts were about as follows: Marshall J. Smith was here in the city, at my office, and asked me if I would like to have such an arrangement made by which I could get a commission on the business, and at the same time give the Hibernia Insurance Company an amount of business. * * *

The arrangement as proposed by him was that I should arrange with the Insurance Company of North America *to accept through me reinsurances in the Hibernia under an open policy issued to me in my name.* He said he would go back to New Orleans—that is, Mr. Smith said that—and confer with the Hibernia, and write me on the subject."

(Record, page 182.)

There is no further evidence as to this conversation. Subsequently, Marshall J. Smith, having returned to New Orleans, wrote on October 6th, 1880, to Charles Platt, Jr., the following letter:—

"OCTOBER 6th, 1880.

Chas. Platt, Jr., Esq., Philadelphia,

DEAR SIR:—Our Mr. Smith has returned home, and begs to refer to his conversation with you in regard to reinsuring here the excess lines of the North America.

We have consulted with the officers of the Hibernia Insurance Company, 'a branch of which company is under our management,' and we propose to take a proportion of the general reinsurance of the North America, excepting coastwise risks from New York here, of which business at the present rates, we believe, the North America does little.

The Hibernia will carry a line of $10,000 on all foreign business of the company at all ports, excepting New Orleans. From New Orleans the line must be limited to $5000, as the Hibernia often have a line from their customers, and they may unknowingly double on a vessel. The Hibernia will allow twenty-five per cent. rebate, and to you a brokerage of fifty per cent.

Should you be able to arrange this, please notify us at once. The Hibernia Insurance Company has a capital of $400,000 paid up, is conservative, and we look upon it here as in every way first-class for the amount of risk they will assume.

Yours truly,

M. J. S. & Co."

(Record, page 231.)

It will be observed that this letter was strictly in pursuance of the original conversation. The Hibernia, being anxious to secure business, was soliciting from the North America a share of its reinsurance, and in order to induce the North America to reinsure with it, makes a statement of its capital and of its general reputation. Platt, who was to act for the Hibernia in the transaction, was to receive a brokerage for his services as originally arranged, and the amount which the Hibernia was willing to risk was stated.

Upon receipt of this letter Charles Platt, Jr., called upon

the officers of the North America and laid before them the Hibernia's proposition. They agreed to give the Hibernia a share of reinsurance business in the manner proposed.

In view of these facts the allegation of the bill and contention of the complainants that the North America applied to the Hibernia for reinsurance is clearly untenable. On the contrary, the Hibernia, throughout, solicited the North America to give it reinsurance business. The president of the North America when asked specifically whether policy No. 268 was issued at the request of his company for its benefit, replied "No." (Record, page 255.) And William A. Platt, vice-president of the North America, testified upon the point as follows:—

"I would say that the Insurance Company of North America never made any application whatever that such a policy should be issued by the Hibernia; * * * The Insurance Company of North America never, by any means, asked the Hibernia Insurance Company to issue to Charles Platt, Jr., any policy whatever."

(Record, page 178.)

After the above conference with the officers of the North America, Platt wrote to Marshall J. Smith & Co. the following letter:—

"PHILADELPHIA, October 11th, 1880.

Marshall J. Smith, Esq., New Orleans,

DEAR SIR:—Your valued favor of the 6th inst. is received, and I note contents with care.

The Insurance Company of North America, through me, will be glad to enter into the reinsurance arrangement with the 'Hibernia' on the terms named. I enclose herewith a policy I had with the 'Home' Insurance Company of Newark, N. J., which you can take a copy of on a 'Hibernia' policy, making the sum insured $10,000. Please send me the policy, and I can begin at once. Of course, all risks accepted by me will be such that the Insurance Company of North America carries their line on, and all risks that are bound by me will be held by the company, as it will not do to have any cancellations. Shall I report all risks to you or the 'Hibernia' Company direct? I see no reason why the arrangement should not prove a success, and I will do all I can to make it so. The most part of it will be grain and general cargo from Atlantic ports to Europe. Please return the Home policy. With many thanks and regards from Mr. Priolet and myself, I am

Yours very truly,

CHARLES PLATT, JR."

(Record, page 231.)

An examination of the details of this letter will serve to show the precise position of affairs. Platt first states that the "Insurance Company of North America, through me, will be glad to enter into the reinsurance arrangement with the Hibernia." What this arrangement was the evidence already cited shows. It was to issue to Platt an open policy in his name, by virtue of which he could reinsure the North America. As the policy was to be Platt's own, he next specifies the exact form in which it is to be issued, and forwards a similar policy held by him, of which a copy is to be made. He asks that the policy may be sent to him forthwith, so that "he may begin." What is meant by this phrase evidently is that he may begin to give reinsurances under it, to accept risks subject to its terms from the North America for the Hibernia. In order to assure the Hibernia, his constituents, as to the sort of risks which he will accept, he specifically states that they "will be such that the Insurance Company of North America carries their line on." In order to have his powers definitely understood he adds, "all risks that are bound (*i. e.*, accepted) by me will be held by the company, as it will not do to have any cancellations." He then asks for instructions as to the reporting of risks, and finally promises that he will do all he can to make the arrangement a success.

The letter is perfectly intelligible and consistent in all its parts. Platt was to act on behalf of the Hibernia in selecting the risks which were to be effected under the policy. He was to be an agent with full powers to bind the Hibernia as to such risks as he accepted from the North America. Such from the first had been, and continued to be the understanding between himself and the Hibernia Company.

The transaction was carried out precisely as indicated in this letter. Policy No. 268 was issued to Charles Platt, Jr., and to him only. Its operative words are:—

"The Hibernia Insurance Company of New Orleans by this policy of insurance do make insurance and cause to be insured Charles Platt, Jr., for account of whom it may concern, lost or not lost, at and from ports in the United States and foreign ports, upon all kinds of lawful goods, merchandise, &c., laden or to be laden on board the good steam or sail

vessel————————,whereof is master, for the present voyage————————, or whoever else shall go for master in the said vessel."

(Record, page 77.)

The policy was an insurance (not a reinsurance) policy in the usual form. Blanks were left for the name of the vessel and master, the voyage, the value of the goods insured, the rate of premium, and the amount of risk effected.

Appended was the following clause:—

"This policy is limited to the sum of $10,000 upon any one vessel from all ports except from New Orleans, where the limit is hereby agreed to and understood to be $5000. This policy is not to cover any risk from port or ports to New Orleans. Notice of each shipment to be given to Marshall J. Smith & Co., managers, as soon as known, and amounts declared as soon as ascertained. This policy to be continuous until canceled by either party giving twenty days' notice, but without any prejudice to risks pending at the date of cancellation.

(Signed) THOS. F. BRAGG,
Secretary."

(Record, page 80.)

It is abundantly evident from the phraseology of this policy that it was radically different in its nature and character from an ordinary open policy of reinsurance. It did not and could not by its terms attach as an open policy does, *ipso facto*. Independent action and agreement were needed to make risks attach under it. It was issued to Platt, and not to the North America. Some positive action was required by Platt in every instance to give to parties other than himself any interest in it. The essential terms of each specific insurance were also in every case to be arranged for. The vessel and voyage were to be named, the amount of risk to be determined, the rate of premium to be fixed. None of these were provided for in the policy, nor were any comprehensive clauses inserted which could be deemed to cover them, as in the case of an ordinary open policy.

It was in fact a policy in the form usual among insurers, and already referred to in the history of the case, issued to Platt, under which he was authorized by the Hibernia, as its agent, to grant reinsurance to the North America, upon appli-

cation made to him, in such cases as he saw fit. It was intended to supply the wants of the North America in cases where its open policies would not apply or suffice. It was for that purpose phrased in most general terms. It was to apply "AT AND FROM ALL PORTS IN THE UNITED STATES AND FOREIGN PORTS UPON ALL KINDS OF LAWFUL GOODS, MERCHANDISE, &C." There was absolutely no limitation as to the ports or as to the character of the goods. These were matters to be determined by separate arrangement in each case with Charles Platt, Jr., the accredited agent of the Hibernia.

That the above was the true effect and intention of the policy is amply shown by the method of carrying on business under it, and by the specific evidence in the case.

(*a*.) It is shown by the method of carrying on business.

As the policy belonged to Charles Platt, Jr., he kept it in his own possession. His evidence is clear on this point.

"Q. Has policy No. 268 always been in your possession and under your control?

A. Always until I gave it up to the court."

(Record, page 189.)

He could not, indeed, say positively that he had ever exhibited the policy to the officers of the North America. (Record, page 189.)

Whenever reinsurance was desired by the North America applications were made out directed to Platt as agent of the Hibernia (record, pages 187–255), in the following form:—

"PHILADELPHIA, 18 .

Reinsurance is wanted by the Insurance Company of North America for $ on on board of the , at and from ; to apply to the excess which the said company may have on all their various policies on vessel, freight, cargo, or profits, including specie or treasure, over $ and to apply *pro rata* with all reinsurance policies on same excess, but not to exceed $

To remain open until particulars are given in.

Premium, per cent.; less per cent., $

When and where built, ; number of decks, ; tonnage, ; rate, .

Secretary.

To the ."

(Record, page 240.)

These applications were made either for excess reinsurance, or for flat reinsurance, as the occasion required. When accepted by Platt, acting for the Hibernia, they were duly entered in his books, a copy of which is in evidence (record, pages 22 to 73), and a notice was then sent by him to Marshall J. Smith & Co., as to the character of the risk, in the following form:—

"Insurance has been made in the Hibernia Insurance Company of New Orleans, under open policy No. 268, for Insurance Company of North America, payable, in case of loss, to them, $ upon on board , at and from to When built, ; where built, ; metaled, ; tonnage, . Remarks, ; rate . Premium, per cent., $.

CHAS. PLATT, JR.

PHILADELPHIA, , 188 ."

(Record, page 240.)

As has been explained in the history of the case, full details of the amount at risk were not always forthcoming. In such cases the information as soon as received was sent to Charles Platt, Jr., and by him in turn transmitted to Marshall J. Smith & Co.

The insurance was, however, closed when Platt accepted the risk. Such was clearly the understanding of all parties. The evidence of Charles Platt, Jr., himself upon this point is conclusive.

"Q. Wasn't each application for reinsurance with the Hibernia placed through you by the defendants under policy No. 268 a separate contract of reinsurance?

A. Yes, sir.

Q. Were such applications for reinsurance made in writing under the form used by the defendants, and if so, produce the same so far as you can?

(Witness produces blank form above.)

Q. Is that the general form for reinsurance applications?

A. Yes, sir; so far as I know. There are other forms for flat reinsurance. This is for excess reinsurance.

Q. What was your method of reporting reinsurances under policy No. 268 to the Hibernia, and please exhibit to us the forms that you used for that purpose?

A. The method was: As soon as the application was received from the Insurance Company of North America we transcribed it on to one of the blanks which I have in my hand, and it was then sent the same day to Marshall J. Smith & Co., for the Hibernia Insurance Company, I presume, of course.

Q. By whom were those blanks of reports prepared?

A. The blanks were prepared by me, copied from a general way of doing by other companies—the customary way.

Q. Please look at the blank forms of applications for marine reinsurance of several insurance companies now exhibited to you, namely, the Phœnix Insurance Company, the Insurance Company of the State of Pennsylvania, and the British and Foreign Marine Insurance Company Limited, and state whether those forms of application are substantially the same as those of the Insurance Company of North America. Please state also whether they are the usual forms of applications in such cases.

A. They are the usual forms in use by those companies.

Q. Used in general by all other companies?

A. Yes, sir; so far as I know. I never saw any different from that."

(Record, pages 187–188.)

All the premiums in the above transactions were paid by the North America to Charles Platt, Jr. (Record, page 194.) All the letters offered in evidence show that the transactions of the Hibernia with the North America were invariably carried on through Charles Platt, Jr. (Record, pages 231–239.) He was, in short, the general agent of the Hibernia Company in Philadelphia.

(*b.*) It is shown by the evidence in the case. The policy was Charles Platt, Jr.'s policy, and not that of the North America. He, himself, swears so distinctly.

"Q. In what was the Insurance Company of North America concerned in so far as the negotiations between Mr. Smith and yourself and the Hibernia Insurance Company were carried on tending to the issuing of policy No. 268?

A. It was done in that way simply as a matter of convenience.

Q. Convenience to whom?

A. To the Insurance Company of North America.

Q. What was convenient to it?

A. Instead of sending it through Marshall J. Smith or to the Hibernia Company, sending to me, as I was on the spot here, and convenient.

Q. Whose policy is No. 268? Is it the Insurance Company of North America's policy, or is it your policy as an insurance broker?

A. *It was my policy.*

Q. In what capacity did you act on policy No. 268?

A. As the policy states, as the agent of the Hibernia Insurance Company.

* * * * * * *

I would like to change that answer, if I may be allowed. I should change it to "As the policy implies," instead of "As the policy states."

Q. In all your correspondence and previous negotiations with Marshall J. Smith & Co., was it not tending towards the issuing of policy No. 268, and subsequently in the carrying of said policy into effect, didn't Marshall J. Smith & Co., as representing the Hibernia Insurance Company, treat with you directly?

A. Yes, sir.

Q. For yourself?

A. Yes, sir.

Q. For your own benefit?

A. Yes, sir.

Q. Is it true, as charged by complainants in their bill, that policy No. 268, though issued to you and in your name, was, in reality, issued to and for the benefit of the Insurance Company of North America?

A. No, sir.

Q. Had the defendants an interest of any nature or to any extent whatsoever in policy No. 268?

A. Only so far as I made them interested in it by accepting their reinsurance; in other words, I mean to say, as I said before, my arrangement under this policy was confined to reinsurance of the Insurance Company of North America. They had no further interest than that.

Q. You always acted as broker and agent of the Hibernia?

A. Yes, sir."

(Record, page 183.)

The president of the North America distinctly states that the policy was not issued to his company, but that it was the property of Charles Platt, Jr., who acted throughout as agent for the Hibernia. (Record, pages 254, 255.) The vice-president of the North America testifies to precisely the same effect. (Record, page 193.)

The brokerage paid by the Hibernia to Charles Platt, Jr., was for his own benefit. The officers of the North America swear that their company had no interest therein. (Record, pages 193, 255.) The president of the North America, in his evidence, gives a detailed statement of the methods of effecting reinsurance, to which the attention of the court is earnestly requested. (Record, pages 255, 256.)

The error of the Master in the conclusion which he reaches in this suit is largely caused by a total failure on his part to distinguish between the operation and legal effect of policy No. 268, and open policies, generally speaking. An examination of the operative clauses of each will distinctly show the difference between them:—

FORM OF OPERATIVE CLAUSE EMBODIED IN OPEN POLICY.

"By this policy of reinsurance the Hibernia Insurance Company of New Orleans agree to reinsure the Insurance Company of North America on merchandise and specie on and after April 11th, 1881. This policy is to apply to the excess which said Insurance Company of North America may have on all their various policies over $60,000 and to apply *pro rata* with all reinsurances on same excess, but not to exceed $10,000 by any one steam or sail vessel. This policy to be continuous until canceled by either party giving twenty days' notice, but without any prejudice to risks pending at the date of cancellation. This policy is subject to such risks, valuations, conditions, and mode of settlement as are or may be taken by the said Insurance Company of North America, notwithstanding anything to the contrary in the within policy, and payment of loss to be made at the same time, as interest may appear, to the extent of $ "

(Record, page 84.)

FORM OF CLAUSE ANNEXED TO POLICY No. 268.

"This policy is limited to the sum of $10,000 upon any one vessel from all ports except from New Orleans, where the limit is hereby agreed to and understood to be $5000. This policy is not to cover any risk from port or ports to New Orleans. Notice of each shipment to be given to Marshall J. Smith & Co., managers, as soon as known, and amounts declared as soon as ascertained. This policy to be continuous until canceled by either party giving twenty days' notice, but without any prejudice to risks pending at the date of cancellation."

(Record, page 80.)

An open policy such as that in column 1 attaches *ipso facto* by its own terms. Policy No. 268 and others similar to it do not attach of their own terms. They only attach when specific action is taken by some one authorized to do so on behalf of the insurer. They are valid alike for original insurance or

reinsurance. The application of them is limited only by the directions to the agent authorized to grant insurance under them.

The Master, in reaching the conclusion that Platt was the agent of the North America and that the policy in question was in reality issued to the North America, relies much upon the following course of reasoning:—

"Complainant is one party to this contract and Charles Platt, Jr., is the other party to it. How then can Charles Platt, Jr., ever be complainant's agent under this contract? It is not a contract conferring authority of agency upon Charles Platt, Jr. This form of contract is not new. Such contracts are outstanding in the hands of merchants in the maritime ports of the world. I do not find it asserted that a merchant who holds a policy of reinsurance, insuring him by name for account of whom it may concern, is the agent of the party making the policy."

(Record, page 310.)

Such a proposition is indeed extraordinary. The form of contract is not indeed new. It is an ordinary one. In the usual course of business the agents of insurance companies are everywhere found with policies in their possession precisely similar to policy No. 268, and with the general understanding of its legal effect and operation precisely as claimed by appellants. Specific evidence was not taken upon the point, because the fact was deemed too notorious to require proof. Numerous cases are however found in the books where such a course of dealing is incidentally referred to as being perfectly understood. See Allen *et al. vs.* St. Louis Ins. Co., 85 N. Y., 473; Boice *vs.* Thames & Mersey Ins. Co., 38 Hun., N. Y., 246; Canada Ins. Co. *vs.* Western Assurance Co., 5 Ontario Appeals, 244.

Particular attention is asked for the case last above cited, where the facts are fully set out and where the course of dealing by which an agent to whom a policy is issued is authorized to grant insurance under it is fully explained. It is sufficient, in answer to the technical difficulties urged by the Master, to cite these practical illustrations. Such difficulties do not in reality exist. The contracting parties in each separate transaction are considered to be the insurer and the insured. The in-

sertion of the name of the agent in the policy does not in any way interfere with the substance of the negotiation.

Two other points are urged by the Hibernia in this connection, which, although not specifically noticed by the Master, deserve passing attention.

(1.) The fact is relied on in order to support the view that the policies were issued at the request of the North America, that certain applications were made to the Hibernia, signed by the vice-president of the North America, in pursuance of which the policies were issued. (Record, page 76.) Such applications were made, but only for the open policies Nos. 277, 296, 297, and 307. The applications are not in the record, but they were mere blank forms signed by an officer of the North America in compliance with the usual custom. (Record, page 177.) The business was all transacted and the applications forwarded through Charles Platt, Jr. How this circumstance can have any real bearing upon questions arising under policy No. 268 is not perceived.

(2.) Some stress is also laid by the complainants upon the correspondence between Charles Platt, Jr., and Marshall J. Smith & Co., of March, 1883, in which the latter intimates a wish that Platt should reduce the lines of the Hibernia on the East India Policy in cases where the North America did not elect to carry the whole sum of $70,000, upon the excess of which they were reinsured; to which Platt replied: "I have no facilities for reducing the lines of the Hibernia, and besides the Insurance Company of North America will not tell me when they will reduce." (Record, pages 232, 233.) It is urged that this language is inconsistent with the position of an agent to effect reinsurance, who would certainly be in a position to know what lines were carried by the North America, in order to estimate the risks and determine the propriety of accepting them. In taking this ground the complainants fail however to observe that the correspondence in question is relative entirely to transactions under an open policy on excess and not to any transactions under policy No. 268. It is admitted that Platt was not an agent to effect reinsurances under the

above-named open policy on excess. Risks upon that policy attached *ipso facto*. He was not, therefore, under that policy properly entitled to information as to the lines carried by the North America. With them he had nothing to do. The letters clearly do not concern policy No. 268, and have no connection with it.

Upon the whole it is conceived that the evidence warrants but one conclusion, to wit, that policy No. 268 was issued to Platt as his own policy, and that he, as agent for the ~~North America,~~ Hibernia was authorized to effect reinsurances under it. The precise effect of the clause in his letter of October 11th, 1880, as to the risks which he would accept, will be considered hereafter. At this stage it is only necessary to observe that in writing that letter, as well as at all other stages of the transaction, he appears to have acted solely as the agent of the Hibernia, and that any statements made by him therein necessarily could not bind the North America in the absence of express authority upon its part to make them. Whatever the understanding was between Platt and the Hibernia, as to the extent of his powers in regard to reinsurance, this could not affect the North America, except so far as communicated to it. Platt was apparently a general agent, with power to effect reinsurance generally to the extent specified in the policy.

"The law is plain that special instructions limiting the authority of a general agent, whose powers would otherwise be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given." Insurance Co. *vs.* McCain, 96 U. S., 84.

The case is somewhat analogous to that of a false statement in an application filled up by an agent of the company for the insured. Such false statement, when knowingly made by the agent, does not avoid the policy.

Insurance Co. *vs.* Wilkinson, 13 Wallace, 222;
Insurance Co. *vs.* Mahone, 21 Wallace, 152;
Insurance Co. *vs.* Baker, 94 U. S., 610.

The Insurance Company of North America never made nor authorized any representation to the Hibernia in connection with the issue of policy No. 268, that it would always retain its usual line upon vessels reinsured under that policy.

The evidence of the only three parties who had any actual knowledge of the circumstances attending the issuing of the policy is conclusive on this head. Charles Platt, president of the North America, testified on that point as follows:—

"Q. Was there anything agreed to, or said, or understood, or intimated at any time between the Hibernia, or its agents, especially Charles Platt, Jr., and Marshall J. Smith & Co., and the Insurance Company of North America, or its authorized agents, to the effect that these defendants should never carry a line of risk less than $50,000, or $60,000, or $70,000, as the case might be?

A. No, sir.

Q. Could complainants reasonably so believe and infer from any custom or act, or saying, or agreement of these defendants?

A. No, sir."

(Record, pages 257, 258.)

Wm. A. Platt, vice-president of the North America, testified as follows:—

"Q. The complainants state in their bill that the defendants contracted never to reinsure under what they (complainants) state to be defendants' usual line of $50,000, and this under the aforesaid policy of October 11th, 1880. Did the defendants ever so contract to your knowledge?

A. They never so contracted, sir. The right has been reserved by every insurance company always, so far as I know, to reduce their lines by as much reinsurance as they can or may wish to make."

(Record, page 177.)

Charles Platt, Jr., the agent of the Hibernia, testified as follows:—

"Q. Was there anything agreed to, or said, or intimated, or written, or understood at any time between the Hibernia Insurance Company, or its agents, specially Marshall J. Smith & Co, and these defendants, or their agents, that the defendants should never carry a line of risks less than $50,000, or $60,000, or $70,000, as the case might be?

A. Not to my knowledge; no, sir."

(Record, pages 185, 186.)

The Master, disregarding these denials, reaches, however, a contrary conclusion from a consideration of the facts as a whole. It will therefore be necessary to examine the ground on which this conclusion is based.

There is admittedly nothing in the original conversation between Marshall J. Smith & Co. and Charles Platt, Jr., relative to the matter in hand. The proposition made by Smith, as testified to by Charles Platt, Jr., was merely that the latter should arrange to obtain reinsurance risks for the Hibernia, but no specification was made of the particular character of risks to be taken. (Record, pages 182, 183.)

The letter of M. J. Smith & Co. to Charles Platt, Jr., dated October 6th, 1880, is equally without information upon the point. There is evidently nothing contained in it which can properly be construed into a statement of the precise character of reinsurance risks which the Hibernia was willing to accept. The writers refer in a general way to "reinsuring here the excess lines of the North America," and to taking "a proportion of the general reinsurance of the North America," as convertible terms. (Record, page 231.) Their meaning clearly is that the Hibernia is desirous to procure a share of the reinsurance on the excess of such sums as the North America might choose in the course of its ordinary business to carry. The proposition is for general reinsurance business and is absolutely without restriction or limitation.

Charles Platt, Jr., after receiving this letter, called upon the officers of the North America and subsequently wrote to Marshall J. Smith & Co. the letter of October 11th, 1880, containing the clause relied upon by the complainants as constituting the representation in question. (Record, page 231.) What took place between Charles Platt, Jr., and the officers of the North America, leading to the writing of above letter, is extremely important. Charles Platt, Jr., testified in chief upon the point as follows:—

"Q. On your receipt of Marshall J. Smith & Co.'s letter of October 6th, 1880, did you make known its contents to the Insurance Company of North America?

A. I imagine I did.

Q. The letter that you wrote of October 11th, of 1880, in which you say the 'Insurance Company of North America through me will be glad to enter into the reinsurance arrangement with the Hibernia on the terms named,' was that statement made by you predicated upon anything that had passed between yourself and the Insurance Company of North America?

A. I certainly wouldn't say it on my own authority."

(Record, page 182.)

On cross-examination the witness testified :—

"Q. When you say that you presume you showed that letter of October 6th, 1880, on its reception to the Insurance Company of North America, was it merely to ascertain whether they would give you such risks now that you had the permission of the Hibernia Company?

A. Yes, sir."

(Record, page 184.)

"Q. I believe that the last question put to you by complainant's counsel in your examination-in-chief was to this effect: Whether you were authorized to write to Marshall J. Smith a letter dated Philadelphia, October 11th, 1880, in which you stated that the Insurance Company of North America would be glad to enter into reinsurance arrangements with the Hibernia on terms named. And in which you state in your answer 'I certainly would not say it on my own authority.' What do you mean by stating that you would not say it on your own authority? Please explain that.

A. I mean that the consent of the Insurance Company of North America was obtained by me to the giving of reinsurance to the Hibernia Insurance Company under my policy No. 268, and I so wrote to Marshall J. Smith & Co.

Q. And that is the meaning of the letter of October 11th, 1880?

A. That is the meaning of it; yes, sir.

Q. In other words, you mean that you obtained the consent of the Insurance Company of North America to give to the Hibernia Company in New Orleans its reinsurance business through you under policy No. 268?

A. Yes, sir."

(Record, pages 182–185.)

This is absolutely all the evidence bearing upon the point. The words quoted by the Master, "I made arrangements with the Hibernia on the terms named and authority derived from the Insurance Company of North America" (Record, page 305),

are not in the record, and are merely an unauthorized conclusion on his part from the testimony as a whole.

It is abundantly clear that the evidence above set out does not support the view that the North America authorized Charles Platt, Jr., to make any representations whatever in the premises. The conclusion of the Master to that effect is wholly unwarrantable. After referring to the clause of the letter of October 11th, 1880, "Of course, all risks accepted by me will be such that the Insurance Company of North America carries their line on," the Master adds:—

"On being asked if that statement was predicated on anything that had passed between himself and the Insurance Company of North America, he replied, 'Certainly; I did not say it on my own authority.'" (Record, page 305.)

Such is the statement of the evidence on which the Master relies. The merest glance at the testimony will suffice to show how glaring is the error. Platt was asked no question whatever as to the authority given him to insert the clause in the letter cited above. The question and answer were these:—

"Q. The letter that you wrote on October 11th, 1880, in which you say, 'The Insurance Company of North America through me will be glad to enter into the reinsurance arrangement with the Hibernia on the terms named,' was that statement made by you predicated upon anything that had passed between yourself and the Insurance Company of North America?

A. I certainly wouldn't say it on my own authority."

(Record, page 182.)

The authority, therefore, given to Platt, according to his own statement, was merely to enter into a reinsurance arrangement "on the terms named," *i. e.*, obviously those specified in the original letter of M. J. Smith & Co., to which Platt was replying. Those terms limited the amount of reinsurance to $10,000 in some cases and $5000 in others, but, as has been already shown, did not stipulate for any particular class of reinsurance, either flat or on excess, nor for the carriage of any special line, by the North America. The evidence wholly fails

to show that any specific direction or permission was given Platt to insert the clause in the letter relied on by complainant. In his cross-examination above set forth at length this point is made abundantly clear.

Again, the Master adds, "These statements were made in the presence and hearing of the president and vice-president of the Insurance Company of North America, and are not disputed." On the contrary, the inference of the Master is most vigorously disputed and emphatically denied. The evidence of the officers in question has been set forth in full above.

On the whole, it is respectfully submitted that there is absolutely no evidence upon which to ground the conclusion of the Master as to the authority given by the North America to Platt to make the alleged representation. In fact, no such authority was given. Platt made the statement of himself. The occasion of it was clear. As has been already shown, Platt was throughout all these transactions acting as agent for the Hibernia. He was arranging for the issuing to him of a policy under and by virtue of which he could accept reinsurance risks for the Hibernia. He was to be the trusted representative of that company. What he did was to bind them conclusively. "All the risks that are bound by me will be held by the company, as it will not do to have any cancellations." Under such circumstances it was natural for him at the very inception of the business to give to his principals some assurance as to how he would carry on the business and what risks he would accept on their behalf. To satisfy them on this point he inserted the clause in question. He would only accept such risks as "the North America carries their line on." Such he engages will be the rule by which he will guide himself. But with this engagement and assurance the North America obviously had nothing to do. It was a matter lying wholly between Platt and the Hibernia. The attempt to make the North America a party to the transaction is futile. The precise weight and meaning to be attached to Platt's assurance to his principals will be more fully considered hereafter.

Insurance companies do not have as their usual line any fixed, unvarying, and definite sum. The North America, in particular, has no fixed usual line of $50,000.

As to the usual practice among large insurance companies in this regard, the evidence of the experts called by defendants is clear. It is, in substance, to the effect that insurance companies do not and cannot establish for themselves a fixed usual line, which they invariably carry upon every vessel. Such a practice would not indeed be consonant with natural reason. The amounts which insurance companies are willing to risk necessarily vary with the class of vessel, the cargo, the voyage, the season of the year, and a multitude of other similar considerations. (Record, pages 268, 269, 274, 280, 282.) The evidence upon this point as to insurance companies in general will be more particularly considered hereafter.

As to the particular case of the North America the evidence is overwhelming. *Prima facie* the invariable retention by any insurance company on every line of its business of this immense sum of $50,000 at risk, irrespective of ship, season, weather, or voyage, is inherently incredible. The following is the direct testimony upon the point.

Charles Platt, the president, testifies as follows:—

"Q. What about defendant's line of insurance on vessels? Has your company any fixed or usual line?

A. No, sir.

Q. Does that line vary frequently?

A. Yes, sir.

Q. Complainants state in their bill that the usual line of insurance kept by your company on vessels is $50,000. Is that allegation correct?

A. No, sir.

Q. If not, state your method of reinsuring, by what you are guided, and the amount of risk you take on any one vessel, and whether such amount varies, or not.

A. There are a great many questions that enter into the amount of the line which the company would be willing to hold. For instance, to illustrate, a vessel that is going to arrive on the coast of America in midwinter during the months of December, January, and February, we would be apt to carry a lesser line on these than on a vessel going to arrive in the midst of summer, and our lines would be regulated by the

nature of the trade, by the season of the year, the character of the assured, and the class of vessel."

(Record, page 257.)

The evidence of William A. Platt, the second vice-president of the North America, is still more conclusive:—

"Q. The complainants state in their bill that your usual line of risk is $50,000. What are your lines of insurance, if you have any? Have you any given or usual line of insurance?

A. I would state that we have no usual line in this company. Some years ago the board of directors of this company gave discretion to the officers to accept risks as they might see fit. This course is always followed in this company. The judgment as to lines, and as to risks, is left with the managers of the company, who confer together as to any one class of business, and conclude about what basis the excess of which to reinsure. As I said, there is no usual line. An amount of $50,000, which appears in many of our policies, was arbitrarily decided upon for the reason that we had to make a line of excess on which to reinsure. $50,000 about represents what this company would carry as a fair average on their whole business on each individual risk, but that line varies very much at all times. The cotton reinsurance, open reinsurance, covers on the excess of $70,000. Some reinsurances that we have cover on the excess of $75,000. Some reinsurances that we have cover on the excess of $65,000. Some reinsurances that we have cover on the excess of $40,000, and so on. There is no usual line of this company, nor has there ever been to my knowledge a line which this company would bind themselves in any way to set as their maximum line, or as their minimum line."

(Record, page 168.)

And again:—

"Q. You have already stated that you have no usual line of $50,000, and therefore I will ask no further questions upon that. Do you confirm that?

A. I confirm that we have no usual line of $50,000."

(Record, page 177.)

And to further strengthen this the witness testified that in dealing with the Hibernia, cases of reinsurance risks where the company did not retain $50,000 were quite as frequent as those where it did retain that sum. (Record, page 175.)

Charles Platt, Jr., the agent of the Hibernia, has, of course, no knowledge on the subject. (Record, page 185.)

No other evidence was adduced upon the point from any witness. It is manifest that the above-recited testimony totally fails to establish the fixed, unvarying line of $50,000, as to the existence of which the Master is so positive.

It is difficult to ascertain the grounds upon which the Master relied in reaching this conclusion. His report reads: "The usual line of respondents, as appeared from the evidence, was $50,000. It generally reinsured the excess of $50,000. This sum, therefore, was its usual line." But no specific evidence is pointed out by him upon the point. It is believed that it is impossible to find throughout the whole testimony any proof that the North America generally reinsured the excess of $50,000. Two matters only suggest themselves which may possibly have been present to the Master's mind:—

(1.) The fact that certain reinsurance policies on the excess of $50,000, issued to the North America, were in evidence.

(2.) A certain transaction relative to the ship "Tonawanda."

Neither of these matters, when properly understood, in the least degree supports the Master's conclusion.

(1.) It is indeed true that certain policies issued to the North America on the excess of $50,000 are in evidence. Of the four policies on excess, issued by the Hibernia, two are stipulated to attach only when the risk exceeds that sum. (Record, pages 88, 92.)

Other instances may also be cited of policies of reinsurance upon that excess issued by other companies, mentioned incidentally in the course of the evidence. The existence of such policies does not, however, in the least degree, prove that the North America usually reinsured on the excess of $50,000, and that for several reasons.

(*a.*) It appears from the record that policies on excesses other than $50,000 were commonly issued to the North America. Of the four policies on excess issued by the Hibernia, one was on the excess of $60,000 (Record, page 84), and another on the excess of $70,000. (Record, page 97.) It was a common practice for the North America to reinsure on the excess of $70,000. (Record, page 128.) In many in-

stances reinsurances were effected on the excess of $40,000 (Record, page 108), or on the excess of $30,000 (Record, page 109), and in some cases on the excess of $20,000. (Record, page 109.) It is apparent, therefore, that no one figure can be definitely fixed upon as that which the North America was usually accustomed to carry. It would be as reasonable to infer from the existence of reinsurance policies on the excess of $70,000 that the usual line of the North America was $70,000, or from the existence of reinsurance policies on the excess of $20,000 that the usual line of the North America was $20,000, as to infer from the existence of reinsurance policies on the excess of $50,000 that the usual line of the North America was $50,000. The testimony wholly fails to disclose that policies on the excess of $50,000 were ordinarily taken, or even that such policies were much more common than those on the excess of other stipulated sums. Ample proof of this fact is afforded by the circumstance that all the excess policies are expressly worded: "To apply *pro rata* with other policies on same excess" (Record, pages 84, 88, 92), evidently implying an anticipation that other concurrent policies would be in existence upon different excesses with which the policies in question would not prorate.

(*b.*) In any event the existence of policies in any number on any stated excess constitutes no proof that the North America usually carried the sums stipulated in such policies as its line. There is nothing to prevent an insurance company holding an open policy on a stated excess from reinsuring in other companies so as to reduce its line at its discretion. The evidence upon this point is exceedingly clear. Wm. A. Platt, vice-president of the North America, testifies distinctly as follows:—

"Our lines vary in the different businesses according to our judgment of the risks. We have never had a given line stated yet that we would carry. This morning I have reduced several lines far below the line that might be considered our maximum line, that is to say, the line which we are permitted, by our board of directors, to carry as a maximum. In steamers we carry $75,000 sometimes, and then again we carry $10,000. But the China Mutual Company, under the Brazil policy, about which I was just speaking (on the excess of $65,000), have no idea that we are covered on the excess of $50,000 also. They cover us on the

excess of $65,000, which we reduce our line, under that policy, down to $10,000, and we do not consider that the China Mutual has anything to do with it. Our neighbors next door, the Delaware Mutual, have open reinsurance policies in the same way, protecting them on the excess of $30,000 up to $55,000. They frequently come to us and place $15,000 flat on a coast-wise cotton vessel, which will reduce their line $15,000 below the sum named for their excess reinsurance. They frequently do that."

(Record, page 109.)

This evidence as to the custom of insurance companies in reinsuring was totally uncontradicted, and in view of the state of facts thus shown it seems impossible to draw any conclusions as to the usual line of the North America from the mere existence of certain policies issued to them on the excess of $50,000. It was clearly competent for them to reduce their line below that sum as they pleased, and they frequently did so reduce it.

(2.) In regard to the ship "Tonawanda," special reference is made by the Master to certain letters passing between the parties. The report reads as follows:—

"In the case of the ship "Tonawanda," application was made to reduce respondent's line on that vessel because respondent's letter of March 10, 1884, to Marshall J. Smith & Co., states: 'In the case of the "Tonawanda," the $10,000 line was retained by special permission, the vessel being known to us, in all respects, as being good, but old.'"

(Record, page 306.)

Although not clearly expressed, the understanding of the Master appears to be that, in this case, the North America asked and received special permission to retain themselves a line of $10,000 only upon this vessel, and that the necessity for that special arrangement affords some proof that the usual line of the North America was a larger amount, which larger amount it was incumbent upon it, under ordinary circumstances, to carry. Such an inference is wholly unwarranted from the evidence in the case.

The facts in reality were as follows: The "Tonawanda" was insured under the open policy No. 306, being a policy on the excess of $70,000, attaching to any extent not exceeding $10,000. At an early date, however, the Hibernia became

unwilling to carry so large an amount on any one vessel, particularly in cases where the North America did not itself care to carry the full sum of $70,000. (Letter, Hibernia Insurance Company, to Charles Platt, Jr., August 28th, 1882. Record, page 237.) Eventually, on June 9th, 1883, the Hibernia wrote definitely reducing their reinsurance line under the policy from $10,000 to $5,000. (Letter June 9th, 1883, Hibernia Insurance Company to Charles Platt, Jr. Record, page 237.) On July 1st, 1883, an agreement to that effect was endorsed upon the policy. (Record, page 97.)

The "Tonawanda" was insured pending the discussion between the two companies as to this reduction of the Hibernia's line. She was insured for $10,000, the full sum stipulated in the policy. Exception to this was afterwards taken by the Hibernia, evidently on the ground that, under the circumstances, it was not proper to place with them, at risk, more than $5000. In reply to this complaint, Charles Platt, president of the North America, wrote the letter cited, stating that the $10,000 had been "retained by special permission, the vessel being known to us as being, in all respects, good, although old." The reference is evidently to the retention of the full line of the Hibernia, and has no connection whatever with the line retained and carried by the North America. This view is decisively confirmed by the statement of the details of this insurance, showing that the North America retained in this case $18,900 at risk. (Record, page 249.) The attempt, therefore, to represent that the North America retained only $10,000, and that by special permission, is futile. It will be observed that the Hibernia, in the correspondence above referred to, acquiesces in the perfect right of the North America to reduce its line below $70,000 entirely at its discretion.

It appears, therefore, that absolutely no evidence has been adduced to support the contention of the Master that $50,000 was the fixed, usual line of the North America. On the contrary, the testimony is clear that the company had no usual line. It needs no reflection to show how entirely under such circumstances the contention of the Hibernia falls to the

ground. In the absence of any fixed line the alleged representation or promise invariably to carry such a line, becomes insensible.

The Hibernia did not issue policy No. 268 upon the faith of any representation as to the retention by the North America of any given amount of risk on any vessel, and the alleged representation, even if made, would not have been binding upon the North America, inasmuch as it was promissory merely, and not a misstatement of any existing fact or facts.

The bill filed in this case, after setting forth the alleged representation by Charles Platt, Jr., asserts that "complainant, upon the faith of said representation, made and delivered the policy of insurance aforesaid." (Record, page 2.) In his report the Master apparently finds this allegation to be supported by the evidence. It becomes material, therefore, to inquire upon what grounds such a conclusion is based. There is absolutely no direct evidence in the case to show that the Hibernia was in any way induced by such representation to issue the policy in question. The only officer of the Hibernia called to testify was James Prevost, the secretary. (Record, page 213.) But his testimony will be searched in vain for any information upon this point. It is confined entirely to transactions subsequent to the issuing of the policy. There is, beyond doubt, a total failure to prove the specific allegation made in the bill.

It may, however, be contended that it was sufficient for the complainants to show that the representation was made, and that it was of such a material character as would reasonably tend to influence them in entering into the contract of reinsurance. There are authorities to that effect.

"A representation in insurance is the communication of a fact or the making of a statement by one of the parties to a contract of insurance to the insurer, in reference to a proposal for their entering into the contract, tending to influence his estimate of the character and degree of the risk to be insured against. A fact or statement having such tendency is called a material fact or statement. One having no such tendency is called immaterial." (Phillips on Insurance, section 524.)

"A representation, however false, has no effect upon the policy, unless it be material. It is, however, important to remember that the question as to the materiality of a representation is not whether the fact stated actually did or possibly could effect the risk, but whether it would materially and reasonably influence the insurer either to make the insurance or in his estimate of the risk." (1 Parsons on Insurance, 408.)

But even tested by this rule the evidence produced is clearly insufficient to support the complainant's case. The testimony of Prevost does not indicate that at the time of issuing the policy of reinsurance in question the Hibernia had any information whatever as to the usual line of the North America. It is not shown that the Hibernia knew whether the North America had any usual line, or, if it had, whether that usual line amounted to $10,000, or $50,000, or $100,000. In the absence of such evidence it is confidently submitted that it is not reasonable to suppose that the alleged representation could have been deemed by the officers of the Hibernia material, or that it could have had any serious effect upon their minds in connection with the issuing of the policy. The alleged representation was simply that the risks ~~offered~~ accepted would be such as the North America carried their line on. In the absence of any evidence to show that the officers of the Hibernia knew what this line was, or whether it existed at all, it is inconceivable that so loose and general a statement could have weighed with them for a moment.

The expression was equivocal and ambiguous; the Hibernia had no right to rely upon it.

"To constitute a representation there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expression is ambiguous the insurer ought to ask an explanation, and not substitute his own conjectures for an alleged misrepresentation."

Livingston *vs.* The Maryland Insurance Company, 7 Cranch, 506; Maryland Insurance Company *vs.* Ruden's Admr., 9 Cranch, 337.

The Master, however, in this connection supports the reasonableness of his conclusion by the following argument:—

"If this were not the case the respondent, however large a business it conducts, could accept risks on every character of vessel, seaworthy or not seaworthy, and under the circumstances the most hazardous, and

to save itself from loss could reinsure the whole risk. This certainly was not contemplated under the terms of the contract made with complainant."

(Record, page 307.)

To this argument there are two conclusive answers :—

(*a.*) Insurance companies in transacting business with each other do not operate absolutely at arm's length, and upon the presumption that one intends to defraud the other. On the contrary, they act upon a faith which experience has proved to be well founded, that fair dealing will be exercised by each toward the other. The business of reinsurance, as now conducted, could not be carried on upon any other footing. Unless, therefore, bad faith on the part of the North America is shown, the argument of the Master is utterly inapplicable. Such bad faith is not even pretended to exist, as will be demonstrated hereafter. The North America, throughout all its transactions with the Hibernia, conducted the business with most scrupulous regard to honor and honesty.

(*b.*) It is impossible that the frauds supposed by the Master could have been practiced in this case. The policy in question, No. 268, was, as has been seen, not an open policy upon which risks were self-attaching, but a special policy which only applied in those cases where Charles Platt, Jr., the agent of the Hibernia, accepted the risk on its behalf. He was the party charged with the responsibility of selecting and approving proper risks for the Hibernia to take. As long as he remained faithful to his duty a fraud upon the Hibernia was impossible.

It is therefore respectfully submitted that the evidence wholly fails to support the alleged motive of the Hibernia in issuing this policy, and that upon this branch of the case the complainant's contention must fall to the ground.

Whatever view may be taken by the court as to the motive of the Hibernia in issuing the policy, it is, at any rate, confidently asserted that the alleged representation was not and could not be binding upon the North America, inasmuch as it was not embodied in the policy.

A clear distinction is taken by all the authorities between representations which amount to a misstatement of existing facts and those which, on the other hand, amount to a mere promise as to a course of action or dealing in the future. A representation which is a misstatement of an existing fact will avoid the policy. But a mere promissory representation as to future conduct or dealing will not avoid the policy, where the representation is not embodied in its terms. In the present case it is abundantly evident that the alleged representation is promissory merely. Taking the view of its effect urged by the complainants and the Master, it amounts to no more than a promise or assurance for the future. Under all the authorities the breach of such a promise does not operate to bind the insured.

An examination of the cases cited by the Master will serve to show that in every instance the misrepresentation relied on was a misstatement as to existing facts.

A representation by an insurer as to rate of premium charged by other underwriters upon the same vessel, which was absolutely false. Sibbald *vs.* Hill, 2 Dow's P. C., 263.

A false statement made by the insured as to the state of his business, and as to a certain alleged partnership. Nalton *vs.* National Fund L. A. Co., 20 N. Y., 32.

An unintentional false statement that a vessel had already reached her destination and discharged her cargo, although in reality this was not the case. Sawyer *vs.* Coasters' Mut. Ins. Co., 6 Gray, 221.

A false statement made in connection with the issuing of a guarantee policy as to the amount of cash which a party actually had on hand, and as to the practice both past and future in regard to the examination of his accounts. Towle *vs.* National Guardian Ins. Ass'n, 30 L. J. (Chan.), 900.

A failure on the part of the insured, in effecting a marine policy, to disclose the existence of two concurrent charter parties then existing upon the vessel. Sun Mutual Ins. Co. *vs.* Ocean Ins. Co., 107 U. S., 510.

A representation by one insurance company reinsuring with another, that it had and retained a certain amount of risk on certain properties, which representation was false. A custom was proved in this case for insurance companies in that locality to divide the risk. Louisiana Mutual Ins. Co. *vs.* New Orleans Ins. Co., 13 La. Annual, 246.

The case of Traill *vs.* Baring, 4 De G., J. & S., 318, which is particularly relied on by the Master, is to precisely the same effect. The facts were these: On May 10th, 1861, life insurance company *A* proposed to life insurance company *B* to reinsure a part of the risk on a certain life, the first-named company stating at the time that it would retain £1000 at risk. On the same day the proposition was accepted. On May 18th the reinsurance policy was issued, and the premium paid. Meantime, on May 15th, the reinsured company had reinsured elsewhere all its remaining risk on the life in question, so that it retained nothing at stake. The life having fallen in, the reinsuring company defended on the ground of a misrepresentation of existing fact at the time of the issuing of the policy. The defense was sustained upon that ground, and upon that alone, as the following extract from the opinion of L. J. Knight Bruce amply demonstrates.

"It may be that until the 15th of May, 1861, the society represented by the defendants continued to intend to abide by that representation, but on the 15th of May, 1861, that intention was changed. The notion of retaining any portion of the liability to the £3000 was abandoned, and a different course was adopted. If that change of intention, if that abandonment, if that different course, if that intention of not retaining any portion of the risk had been communicated to the society represented by the plaintiffs, as it ought to have been, without delay, all might have been well. But no such thing was done, and three days after this uncommunicated change of intention the assurance was allowed to be completed. That assurance should not have been allowed to be completed without a full and clear communication that the intention represented to exist of retaining the liability under the £3000 policy to the extent of £1000 had been abandoned."

Not a single authority has, therefore, been cited by the Master to show that the breach of a promissory representation merely will suffice to avoid a policy. On the contrary, the authorities are unanimous to the opposite effect.

In Alston *vs.* Mechanics' Mut. Ins. Co. of Troy, 4 Hill, 329, it appeared that at the time of the issuing of the policy the insured made a promise to abandon the use of a certain cooking stove in the premises insured. He failed to abandon its use, and in consequence a loss occurred under the policy. But the existence of the promise and the failure to keep it was held no defense on the part of the insurer. The court saying:—

"Where the insured acts in good faith, without any intent to deceive and without concealing or misstating any fact within his knowledge which it is essential to the underwriters to know to enable them to judge of the propriety of assuming the risk, and the amount of premium and other conditions of the policy, common justice requires that the party who pays the premium shall be informed by the terms of the written agreement what is the real contract between him and the underwriters: and it should not be left to the uncertain recollection of any one to prove a different agreement from that which is contained in the written policy."

In Kimball *vs.* Ætna Ins. Co. *et al.*, 9 Allen, 540, the subject was examined at length. In that case the insured made a parol promise, at the time of the issuing of the policy, that the insured premises should continue to be occupied. They were not so occupied, and a loss occurred under the policy. The insurer was nevertheless held liable. Mr. Justice Gray, in delivering the opinion, used the following explicit language:—

"The word 'representation' has not always been confined in use to a representation of facts existing at the time of making the policy, but has been sometimes extended to statements made by the insured concerning what is to happen during the term of the insurance; in other words, not to the present but to the future; not to facts which any human being knows, or can know, but to matters of expectation or belief or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty, which must be strictly complied with) are sometimes called 'promissory representations,' to distinguish them from those relating to facts or to 'affirmative representations.' And these words express the distinction; the one is an affirmation of a fact existing when the contract begins, the other is a promise to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself, or it may be in the form of a written application for insurance referred to in the policy in such a manner as to make it in law a part thereof, and in either case the

whole instrument must be construed together. But this written instrument is the expression and the only evidence of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be oral or written, for if it does not exist there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no such effect; for if it is a mere statement of an expectation subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract."

The precise question was presented to this court in Union Mutual L. I. Co. *vs.* Mowry, 96 U. S., 544. In that case the agent of a life insurance company at the time of the issuing of the policy represented to the insured that actual notice would be given to him of the times when all premiums fell due, although no such clause was inserted in the policy. The representation was held by the court to be clearly promissory and not binding. Mr. Justice Field, in delivering the opinion, used the following language:—

"All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premiums to be paid were there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties with all the conditions upon which its fulfillment could be claimed must be conclusively presumed to be there stated. If by inadvertence or mistake provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for the correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected the policy must be taken as expressing the final understanding of the assured and of the insurance company."

See also Hosford *vs.* Germania F. I. Co., 127 U. S., 399.

In the case of The Prudential Assurance Co. *vs.* The Ætna L. Ins. Co., 52 Conn., 576, in the United States Circuit Court, a state of facts arose almost precisely similar to that now before the court. One life insurance company reinsuring a portion of a risk with another stated that it would keep itself

$10,000 at risk on the same life. After the reinsurance policy was effected, the reinsured company effected further reinsurance to the extent of its whole interest. The life having fallen in, the reinsuring company was sued for the amount of its policy and set up as defense the breach of the representation. The court in an able opinion held, however, the representation to be promissory merely and not binding upon the company making it. The grounds for this conclusion were substantially the same as those set forth in the cases already cited above.

"The insurer is at liberty to compel an observance of promises in regard to future conduct by incorporating them into the written contract, if it regards a performance as important, but the promise unless embodied in the contract is not a part of it. All things to be done by one or the other during the continuance of the written agreement, upon the doing of which the life of the contract depends, must appear in the agreement."

Numerous other cases may be cited in which the same principles have been laid down.

A representation by a party insured that the premises covered by a policy of fire insurance would be little occupied, and that no fire would be used in them, was held an insufficient defense to a claim for a loss occasioned by placing a steam engine in the premises. Girard F. & M. Ins. Co. *vs.* Stephenson, 37 Penna. St., 299.

A false representation as to how frequently in the future an account of the stock of a store would be taken was held not to avoid a policy. Wynne *vs.* Liverpool L. & G. Ins. Co., 71 North Car., 121.

A representation that a vessel would sail within five days was held immaterial, although not complied with, the court saying:—

"The declaration of the underwriter, that unless the vessel should sail by a certain day he would not be bound, should have been made a part of the written contract, if he intended to avail himself of it. Parol evidence is not sufficient to give it effect." Whitney *et al. vs.* Haven, 13 Mass., 172.

See also, upon this point, Vandervoort *vs.* Smith, 2 Caines, 222; Allegre's Admrs. *vs.* Maryland Ins. Co., 2 Gill & J.,

136; Harvey *vs.* Seligman, 10 Ct. of Sess. Cases (4 S.), 680; Bryant *vs.* Ocean Ins. Co., 22 Pick., 200; Mayer *et al. vs.* Brooklyn F. Ins. Co., 4 Keyes (N. Y.), 465; Rice *et al. vs.* New England M. Ins. Co., 4 Pick., 439.

The disposition of the courts, in all cases, is to rule out parol evidence of a promissory character. In this regard the same principles of evidence control as in cases of other written contracts. Bell *vs.* Western M. & F. Ins. Co., 5 Robinson (La.), 423; White *vs.* Ashton, 51 N. Y., 280; Higginson *vs.* Dow, 13 Mass., 96. The latter case is particularly instructive as showing the position taken by the courts in these cases. The action was upon a policy of marine insurance. The defendants offered in evidence a written memorandum, signed by the agent of the insured and given by him to the insurance broker, stating "that the policy was to take effect if the vessel should sail with a cargo and no insurance was made elsewhere." It appeared that the vessel had been elsewhere insured, and the question was whether the memorandum was properly admitted in evidence. The court, in an opinion by PARKER, C. J., held that it was not, stating the reasons as follows:—

"The question proper to be first settled by us is whether the written memorandum, which was received in evidence, ought to have been admitted, and also the fact relating to it, which might have been proved by the testimony of the broker. Indeed, there seems to be no reason why the latter should have been rejected, if the former was admitted; both being parol evidence, and neither of them making a part of the contract which was finally agreed to by the parties. And we are all of opinion that it ought not to have been admitted for the purpose for which it was offered; which was, to show that the policy was void in consequence of the insurance made by the plaintiff abroad. Although policies of insurance are not technically specialties, not being under seal, they have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties. The policy itself is considered to be the contract between the parties, and whatever proposals are made, or conversations had, between the parties, prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it. Representations, however, of the state of the vessel, and giving a description of the voyage may be proved by oral or written testimony, when the object is to falsify those representations; for many things material to the risk are stated in the application

for insurance, which are not usually made a part of the policy; and it is part of the law of insurance, that such representations may be so proved. Warranties, however, must always be inserted in the policy, as also any agreements as to the policy being vacated on the happening of any event agreed on by the parties.

The paper admitted in evidence was in some respects a representation; but it was not intended at the trial to falsify it in that respect. The sole object for which it was introduced was to avoid the policy on account of an event specified in the paper. It was, in fact, to make the policy conditional, when by its terms it was absolute, which would, in effect, be annulling and destroying the contract by extrinsic matter proved by parol, and thus defeating the intention of the parties as expressed in the instrument made to carry that intention into effect. However probable it may be in the present case, that the written memorandum was looked to by insurer and insured as the grounds of their contract, it would tend to great uncertainty and inconvenience to depart from the known rules, in cases of such universal influence."

In view of the authorities above cited, it is confidently urged that the alleged representation relied upon in this case, being purely promissory, was not and could not be binding upon the insured. If the alleged stipulation as to the amount of risk which the North America was in every case to carry was an integral part of the contract, the company had a right to insist upon its insertion in the policy, that they might know precisely what their rights and duties were. The policy was exhibited by Charles Platt, Jr., to the officers of the North America (Record, page 178), but it contains no clause bearing in any way upon the question. In the absence of such a clause, it is respectfully submitted that the North America was justified in assuming that there was no binding contract in regard to the matter.

There is no usage or custom among insurance companies reinsuring with each other, that the reinsured company shall retain any certain, definite, fixed sum at risk.

The complainants in their bill, conscious of the inherent weakness of that portion of their case which rests upon an alleged express agreement on the part of the North America

to retain in every instance the sum of $50,000 at risk, sets up, in addition, a usage or custom among companies reinsuring with each other, that the company insured shall always retain its usual line upon every vessel; subject to which custom it alleges policy No. 268 was issued. (Record, page 4.)

The Master in his report states that evidence of a usage or custom to that effect was produced, but does not positively assert that it was proved. His exact language is: "If this be the custom, and there is no evidence produced to dispute it, then complainants' case becomes much stronger." (Record, pages 309–310.)

In thus finding appellants contend the Master was directly in error. The inconsistency of his position is obvious. If such a custom existed, why should the alleged representation in accordance with the custom be made; and how can the existence of the custom be said to strengthen complainant's position as to the representation upon which he chiefly relies?

Apart from these considerations, however, it is proposed to consider the evidence upon which the finding as to the alleged usage or custom is based.

The witnesses relied upon are Paul Fourchey, president of the Merchants' Mutual Insurance Company of New Orleans, and Joseph A. Chalaron, president of the Hope Insurance Company of New Orleans. The evidence of these gentlemen is, briefly, to the effect that every insurance company has a fixed line, usually $5000 or $10,000, and that in the experience of both witnesses a company reinsuring its risks is invariably understood to retain that line. That all reinsurance contracts are entered into with that understanding. (Record, pages 209–213.)

The value of this testimony as bearing upon the matter in hand is to be tested by the knowledge and experience of the witnesses and their familiarity with insurance transactions generally. Their cross-examination was especially directed to this object.

Mr. Fourchey upon being questioned stated that he was not acquainted with the insurance customs and usages that prevailed in New York, Philadelphia, Boston, and England. That

he had "very few dealings with outside companies;" that he was only acquainted with local customs in New Orleans; that there were a great many local regulations. (Record, page 222.) That he had done business both on the Mississippi and on the ocean, but that his business did not extend as far as the Pacific and Indian Oceans. That his experience seldom covered voyages of long periods of time, say two, three, five, six, and seven months. That the insurances effected by him were generally on direct voyages from point to point. That he had never held open policies for large amounts on vessels trading to distant ports. (Record, page 223.) When asked how he reached the conclusion as to the custom of retaining a fixed line he testified as follows:—

"*Q. How do you reach such a conclusion?*
A. Because that is the local custom in New Orleans.
Q. Do you know if that is the custom abroad?
A. I don't know."

(Record, page 225.)

He was further asked as follows:—

"*Q. Do you know of any company that would bind itself to carry at all times the same line for one year or a number of years, especially a large line of $50,000?*
A. I cannot say I do.
Q. That would be a very unusual proceeding, would it not?
A. I do not know of any such case."

(Record, page 222.)

The cross-examination of Mr. Chalaron is no less satisfactory. He stated that his company carries a line of $5000, but that even that was not invariable, as that amount was only carried on vessels rated as A No. 1. That he was acquainted to a limited extent only with the usages and customs of reinsurance as prevailing in New York, Philadelphia, Boston, and England. That the largest marine business in the country was done in New York, and that the customs of the companies there would control risks so far as that port was concerned. (Record, page 227.) He further stated that it is always un-

derstood that a reinsuring company keeps its line, unless it discloses the reason for not keeping it, and further continued:—

"Q. Did you say that this is the case in New York?
A. I think it is."

(Record, page 228.)

Any more definite testimony as to his knowledge of the custom in question he was unable to give.

The question presented to the court in this case is obviously not what is the local custom of New Orleans, but what is the general custom in regard to reinsurance obtaining throughout the country at large. It is not the question of the custom of small companies having a line of $5000 or $10,000, doing a limited business on short voyages, but of the custom of the great companies of the country having lines sometimes as large as $100,000, doing an extensive business in all portions of the habitable globe. When the Hibernia undertook to deal with the North America, and to place reinsurance upon vessels of a different character, and upon different voyages from those on which her own insurance risks were generally placed, she evidently subjected herself to such customs as obtained in the insurance world generally in regard to such vessels and such voyages, and could not claim the benefit of any special or local customs of New Orleans and its vicinity.

In view of these facts the testimony of Fourchey and Chalaron is absolutely without weight. They practically admit their lack of knowledge as to insurance customs generally; and base their evidence simply upon their acquaintance with local usages. Their lines are from $5000 to $10,000 only. (Fourchey, Record, page 209; Chalaron, Record, page 212, 213.) Of the customs of companies having vastly larger lines and vastly different business they confess themselves substantially ignorant.

Their evidence on this head is not as reported by the Master, entirely uncontradicted; on the contrary, it is flatly opposed by the evidence of five witnesses eminently qualified by reputation and experience to speak with authority upon the point.

The evidence of these witnesses, totally disregarded by the Master, is to the following effect:—

The question put to all of them was as follows:—

"Do or do not the lines carried by insurance companies vary greatly, according to seasons, voyages, character of ships, &c., and is it or not the usage or custom of underwriters to bind themselves to any invariable amount as to the risks to be carried by them? Do or do not, on the contrary, those amounts at risk vary constantly, according to circumstances?"

W. J. Comes, president of the Commercial Mutual Insurance Company of New York, replied:—

"Lines carried by insurance companies vary greatly, according to seasons, character of vessels, &c. It is not the usage or custom for underwriters to bind themselves to any invariable amount as to risks to be carried by them. On the contrary, the amounts so carried would vary constantly, according to circumstances."

(Record, page 268.)

Ferdinand Motz, president of the Great Western Insurance Company of New York, replied:—

"Lines carried by insurance companies vary greatly, according to seasons, voyages, character of the ship, &c. It is not the usage or custom of underwriters to bind themselves to any invariable amount as to the risks to be carried by them. Those amounts so carried vary constantly, according to circumstances."

(Record, page 269.)

Ransom B. Fuller, president of the Boston Marine Insurance Company, replied:—

"Lines retained by insurance companies, particularly a large or strong company, vary very materially on season, voyage, class of vessel, and the nature of the cargo carried, and I never knew of any company making or following any invariable rule on such line to be retained."

(Record, page 274.)

Henry D. Sherrerd, president of the Insurance Company of the State of Pennsylvania, replied:—

"The lines carried by insurance companies vary greatly, according to seasons, voyages, cargoes, ships, &c. It is not the usage or custom for

underwriters to bind themselves to any invariable amount as to the risks to be carried by them. The amounts at risk do vary constantly, according to circumstances."

(Record, page 280.)

Thomas C. Hand, president of the Delaware Mutual Insurance Company, replied:—

"The lines carried by the insurance companies vary greatly, according to the seasons, voyages, cargoes of ship, &c. It is not the usage or custom of underwriters to bind themselves to any invariable amount as to the risks to be carried by them. The amounts at risk do vary constantly, according to circumstances."

(Record, page 282.)

It seems unnecessary to add anything to the evidence above stated. It speaks for itself, and evidently shows that no such custom or usage exists as the complainants allege. It is indeed inherently incredible that such should be the case. Insurance companies do not, as has already been seen, have generally any fixed, unvarying sum as their usual line. It is impossible, therefore, that any custom should exist as to their retention of such sum.

No reference has been made above to the evidence of the officers of the respective parties touching the custom in question. No specific testimony upon the point was taken during the examination of the officers of the North America. But the whole tenor of their evidence is inconsistent with the existence of the custom alleged. Prevost, the secretary of the Hibernia, of course, testifies to the existence of the custom, but his evidence is open to the same objection as that of Fourchey and Chalaron. He does business in New Orleans also. He admits that he has had very little experience with marine insurance in far-off oceans; in fact, that he has had none, except on vessels from New Orleans to northern points. He further testified as follows:—

"Q. *Do you know what are the usages relative to marine insurance in Philadelphia, Boston, New York, and England?*

"A. *I don't know. But I know what is considered right and what is considered wrong. I know that much. I don't know the customs of those places.*"

(Record, page 218.)

With this magnificent assertion of the inherent superiority of Mr. Prevost's system of ethics to the established customs of insurance and business generally, we propose to dismiss him, and with him the subject of the alleged custom.

At the time the several risks were effected under policy No. 268, the Hibernia, through Charles Platt, Jr., had express notice that the North America in many instances was not carrying $50,000, notwithstanding which it accepted such risks without objection. This conduct on its part indicates a construction of the contract by its officers entirely in accord with that held by the North America, and acts in addition by way of estoppel.

The complainants aver specifically in their bill that in numerous cases where reinsurances were effected with them, the North America did not retain $50,000 at risk; and that in these cases the risks were accepted by them, and subsequently the losses paid, in ignorance of the fact that the North America was not retaining that amount at risk upon the vessel. It is, of course, essential to the maintenance of their case that they should show the facts thus alleged to be true. The Master in his report substantially finds the allegations of the bill to be proven. It is proposed to show that in this he is entirely mistaken, and that the evidence does not warrant any such conclusion.

It is conceded that in many instances the North America reinsured under policy No. 268 in cases where they did not retain $50,000 at risk. Charles Platt, president of the North America, distinctly states so. (Record, page 257.) William A. Platt enumerates almost a hundred of such cases, and states that he could name many more. (Record, pages 173, 174.) Charles Platt, Jr., to whom applications for such risks were addressed, is very clear upon the point:—

"Q. Do you not know that these defendants have frequently reinsured with you flat under policy 268 or on excesses for less than $50,000—for example, $40,000, $30,000, $25,000?

A. Yes, sir; I think I do. I do; yes, sir.

Q. Do you know a number of them?

A. I don't know any individual risk. I couldn't name them without reference to my files.

Q. Suppose I would indicate to you some, could you recognize them by the names?

A. I don't know that—I think it is very doubtful.

Q. Please refer to your files, if you have them here, and state a number—taking them hap-hazard.

A. I accepted $10,000 on the excess over $30,000 on merchandise on board the steamship "Peruvian," at and from Portland to Liverpool, dated April 8th, 1882."

(Record, page 186.)

No objection was ever made by the Hibernia to any of these risks. (Evidence of Charles Platt, page 257; evidence of William A. Platt, page 175; evidence of Charles Platt, Jr., page 186.)

In a large number of these cases the application was made to Charles Platt, Jr., acting for the Hibernia for reinsurances on excess, in the following form:—

"PHILADELPHIA, , 18 .

Reinsurance is wanted by the Insurance Company of North America for $10,000 on sugar on board of the ship 'Obi,' at and from Philippine Islands to Boston; *to apply to the excess which the said company may have on all their various policies on vessel, freight, cargo, or profits, including specie or treasure, over $25,000*, and to apply *pro rata* with all reinsurance policies on same excess, but not to exceed $10,000.

To remain open until particulars are given in.

Premium 3½ per cent., less per cent., $

When and where built, Y., '64; number of decks ; tonnage, 1012; rate 3¾, ⅜, 1, 7, 1.

WM. A. PLATT, ,

TO CHARLES PLATT, JR. *Vice-President.*"

(Record, pages 240–242.)

Whereupon he notified M. J. Smith & Co., acting for the Hibernia, in the following form:—

"Insurance has been made in the Hibernia Insurance Company of New Orleans under open policy No. 268, for Insurance Company of North America, payable, in case of loss, to them, for $10,000 upon sugar, *being excess over $25,000* on board ship 'Obi,' at and from port or port in the Philippine Islands to Boston, direct port.

When built, '64; where built, Y.; metaled, and special survey 1880; tonnage, 1012.

Remarks, ; rate, 3¾, ⅝, 1, 7, 1.

Premium, 3¾ per cent., $

CHAS. PLATT, JR.

PHILADELPHIA, June 11th, 1881."

(Record, page 242.)

There are not merely a few instances of such applications and notices. The cases enumerated by William A. Platt, above referred to, are almost all of that character. His evidence is as follows:—

"Q. Can you say whether or not the Hibernia Company at all times accepted without objection risks from the defendants on various excesses below $50,000, or flat below $50,000, and if so, name them?

A. I can say so, sir; and I can name excesses without number, I was going to say. I can take them right off the reinsurance books at once. On the 13th of October, 1880, they accepted a risk on the ship 'Shelbourne' from Philadelphia to Dublin, $10,000 on the excess of $40,000. On the 25th of October, 1880, they accepted a risk of $7500 on the excess of $35,000 per steamer 'Barcelona,' from Cadiz to Montreal. On the 26th of October, 1880, they accepted a risk on the ship 'Waltikka,' $10,000 on the excess of $40,000. On the same date they accepted a risk on the bark 'Butshire,' from Baltimore to Antwerp, $10,000 on the excess of $40,000. On the 26th of October, 1880, they accepted a risk on the steamer 'Golden Horn,' from Middlesborough to Philadelphia, $5000 on the excess of $25,000. On November 4th, 1880, they accepted on the ship 'Antoinette,' from Philadelphia to Waterford, $10,000 on the excess of $40,000. On the 13th of November, 1880, they accepted a risk on the bark "Muriel," from New Orleans to Cork for orders, &c., of $10,000 on the excess of $20,000. On the 16th of November, 1880, they accepted a risk on the ship 'City Camp,' from Baltimore to Belfast, of $10,000 on the excess of $40,000. On the 29th of November they accepted a risk on the bark 'Kate Burrill,' from Baltimore to Belfast, $5000 on the excess of $40,000; and on December 22d, a risk on the ship 'N. B. Lewis,' from Philadelphia to Havre, of $5000 on the excess of $40,000. On the 3d of December they accepted $5000 on the excess of $40,000, on the bark 'Matts August,' from Baltimore to the United Kingdom, &c. On the 4th of December they accepted a risk of $10,000 on the excess of $40,000 by the ship 'Altai,' from Baltimore to St. Nazaire. On the 8th of December they accepted a risk of $10,000 on the excess of $40,000 on the bark 'Norwood,' from Baltimore to Havre; and the next day they accepted a risk of $10,000 on the excess of $40,000 on the steamer 'Irthington,' from Liverpool to Baltimore. On the 10th of December, they accepted a flat reinsurance of $5000 on the

ship 'Prince Arthur,' from Bahia to Halifax. On the 10th of December they also accepted a risk of $2500 on the bark 'Governor,' from Antwerp to Halifax. On the 14th of December they accepted a risk of $5000 on the excess of $30,000 on the bark 'Usko,' from Baltimore to Queenstown. On the 23d of December they accepted a risk of $5000 on the excess of $25,000 on the ship 'Livingston,' from Philadelphia to the United Kingdom, &c.; and on the 27th of December they accepted a risk of $5000 on the excess of $75,000, on the ship 'Gebroeders Smit,' from Java to Boston. On the 4th of January, 1881, they accepted $7500 on the excess of $40,000 by the ship 'Lena,' from Baltimore to Rotterdam; and on the same date they accepted $10,000 on the excess of $30,000 on the bark 'Nueva Ignacia,' from Pernambuco to Philadelphia. On the 5th of January they accepted $10,000 on the excess of $30,000 by the brig 'Jeremiah,' from Cardenas to Philadelphia. On the 12th of January they accepted $10,000 on the excess of $40,000 on the ship 'Semiramis,' from Baltimore to Antwerp. On the 17th of January they accepted $5000 on the excess of $40,000 on the steamer 'Whitburne,' from Philadelphia to Genoa. On the 21st of January they accepted $10,000 on the excess of $90,000 on the steamer 'City of Austin,' from Havana and Matanzas to New York. On the 22d of January they accepted $7500 on the excess of $30,000 on the ship 'Theodore H. Rand,' from New York to Antwerp. On the same date they accepted $10,000 on the excess of $40,000 on the steamer 'James Gray,' from Philadelphia to the United Kingdon and Continent. On the 28th of the same month they accepted $10,000 on the excess of $40,000 on the ship 'Cashier,' from Philadelphia to Bordeaux; and on the 31st of the same month they accepted $5000 on the excess of $40,000 on the ship 'Peacemaker,' from New Orleans to Havre. On the 9th of February they accepted $5000 on the excess of $30,000 on the bark 'Gloamin,' from New York to the United Kingdom. On the 14th of February they accepted $10,000 on the excess of $40,000 on the schooner 'Wallace J. Boyd,' from Boston to Philadelphia. On the 15th of February they accepted $10,000 on the excess of $60,000 on the steamer 'Claudius,' from Laguayra, Puerto Cabello, Curaçoa, to Philadelphia. On the 17th of February they accepted $10,000 on the excess of $35,000 on the bark 'Rowland Hill,' from Philadelphia to Antwerp. On the 23d of February they accepted $10,000 on the excess of $40,000 on the bark 'Beppino Accame,' from Baltimore to Rouen. On the 2d of March, 1881, they accepted $10,000 on the excess of $40,000 by the following vessels: Bark 'Payson Tucker,' Cardenas to New York; brig 'Maria W. Norwood,' Sagua to Boston; schooner 'Martha N. Hall,' Cuba to Boston; brig 'Josephine,' Cuba to Boston; schooner 'Thomas J. Lancaster,' Cuba to Boston; bark 'Havana,' Cuba to Boston; brig 'Hyperion,' Cienfuegos to Boston; brig 'Woodland,' Cardenas to Philadelphia. On the same day they accepted $10,000 on the excess of $60,000 on the steamer 'Belgenland,' from Philadelphia to Antwerp. On the next day they accepted $10,000 on the excess of $30,000 on the bark 'Icarus'

or 'Maceio,' from Pernambuco to Philadelphia. On the same day they accepted $10,000 on the excess of $40,000 on the bark 'Gamaliel.' On the next day they accepted $10,000 on the excess of $40,000 on the schooner 'Mary L. Peters.' The next day they accepted $10,000 on the excess of $40,000 on the bark 'Kiota,' from Cuba to Boston. On the same day they accepted $10,000 on the excess of $40,000 on the bark 'Esther,' from Cuba to Boston.

From these examples which I have given it will be seen that the Hibernia Insurance Company accepted special risks from the defendants on various excesses in various amounts, which were received by them without comment. Payment of the premium on the reinsurances as reported under these open reinsurances or flat reinsurances was also received by them without comment.

Q. Did the complainants at any time complain of those risks taken by them under a line of less than $50,000, and did they at any time complain that you did not carry what they allege in their bill to be your usual line of $50,000 on which they pretend to have at all times relied?

A. No, sir; they did not at any time make such complaint, and I would say that reinsurances effected by this company on excesses under what the complainants term the usual line of the defendants, would number in amount about the same quantity as on the excess of what the complainants state to be the defendants' usual line, $50,000."

(Record, pages 173, 174, 175.)

The question is whether in such cases express notice was not given to the Hibernia of the fact that the North America was not carrying the entire $50,000. At first sight, there would seem to be no escape from such a conclusion. The application and notice, as in the case of the "Obi" above stated, was expressly "for $10,000 upon sugar, being excess over $25,000," which would evidently appear to mean that the North America retained but $25,000. Prevost, however, in his evidence, contends that this was not notice to him of the fact that the North America had not its whole line of $50,000 upon the vessel, claiming that the notice was only to the effect that they had but $25,000 on sugar, and that the balance of the $50,000 might be made up by insurance on vessel, freight, or other cargo.

(Record, pages 202, 203.)

The Master substantially sustains this contention, saying:—

"There is nothing in that notice to inform complainant respondent was not carrying the amount of $50,000; for the reason that the vessel, the freight, profits, and many other things are not included in the term

cargo. The evidence shows respondent was insuring the hulls of vessels. Therefore complainant had a right to infer the hull of this vessel was also insured. I am not prepared to say there is anything contained in the notices that would lead complainant to infer respondent was not carrying its usual line on any of these vessels."

(Record, page 312.)

This line of reasoning is conclusively answered by one consideration. The Hibernia was not entitled in the ordinary course of business to put any such forced or strained interpretation upon the applications and notices. These meant precisely what they said, to wit: That the North America had a sum certain at risk, upon the excess of which they desired to reinsure and had reinsured. No conclusion could properly be drawn that the North America had any larger sum at risk upon the vessel as a whole.

The evidence of the experts whose depositions were taken upon this point is unanimous; and is absolutely uncontradicted, save by the testimony of Prevost, secretary of the company complainant. That evidence is as follows. The question asked each of the witnesses was:—

"If an application for reinsurance is made, say by the North America to the Hibernia, for $10,000 upon sugar, being in excess of $25,000, on ship 'Obi,' bound to Boston from Philippine Islands, in June, 1881, could or would you understand, or could the Hibernia understand and believe, that the North America carried or intended to carry a risk greater than $25,000 on said ship 'Obi' at the time of the application? Would it be or would it not be reasonable to think and infer from such an application that the North America carried or intended to carry insurance on anything else on that voyage of the 'Obi' than the sugar mentioned in the application, and if the risk bore on a mixed cargo would it or not be so stated in the application? Would it or not be reasonable for the Hibernia to infer and believe from such an application that the North America carried or intended to carry $50,000 on said ship 'Obi,' distributed on the hull or other cargo of said ship, as the Hibernia say they presumed and believed?"

To which they replied as follows:—

W. J. Comes, president of Commercial Mutual Insurance Company of New York:—

"I would not understand from such an application that the North America intended to carry a risk greater than $25,000 on ship 'Obi' at

the time of the application. I would infer from such an application that the reinsurance with the Hibernia attached only on sugar, and that the $25,000 might cover other interests besides sugar if the application was in the usual excess form. If the reinsurance in the Hibernia had been intended to cover any other interest than sugar it would have been so stated in the application. I do not think it would have been reasonable for the Hibernia to infer that the North America carried or intended to carry $50,000 on the risk per 'Obi.'"

(Record, page 268.)

Ferdinand Motz, president of the Great Western Insurance Company of New York:—

"By such an application I should understand that the North America intended to carry no greater risk than $25,000 on ship 'Obi' at time of the application. From such an application the reinsurance with the Hibernia would attach only on sugar, but the $25,000 might cover other interests besides that of sugar, if the application was in the usual excess form. If the reinsurance in the Hibernia had been intended to cover any other interest than sugar it would have been so stated in the application. It would not have been reasonable for the Hibernia to infer that the North America carried or intended to carry $50,000 on the risks per 'Obi.'"

(Record, page 269.)

Ransom B. Fuller, president of the Boston Marine Insurance Company:—

"If proposal were submitted to me for $10,000 on sugar, excess of $25,000 by the Insurance Company of North America, I should suppose the said company retained not over $25,000 on sugar, and might reasonably reduce its net line on sugar to less than that sum by flat reinsurance or reinsurance on an excess less than $25,000 in other companies. That the said company might, and very probably would, retain other more desirable goods up to $50,000, or whatever sum they deemed prudent to carry, which matter of prudence would seem to be a matter for their own consideration only. If the risk bore on a mixed cargo the reinsurance might very properly be made on one article, such as sugar only, and I should not be supposed to know or presume that there was other cargo to be reinsured unless the proposal stated 'goods' rather than 'sugar,' or any other one specific kind of merchandise."

(Record, page 274.)

Henry D. Sherrerd, president of the Insurance Company of the State of Pennsylvania:—

"If such an application as is specified in the first part of the third interrogatory had been made by the Insurance Company of North America

to the Hibernia Insurance Company, the Hibernia Insurance Company could not understand or believe that the Insurance Company of North America carried or intended to carry a risk greater than $25,000 on said ship 'Obi' at the time of the application. It would not be reasonable to suppose that the North America intended to carry any insurance on anything else on the voyage of the 'Obi' specified than the sugar mentioned in the application. If the risk bore on a mixed cargo it would not be so stated in the application; it would be generally stated 'cargo.' It would not be reasonable for the Hibernia Insurance Company to infer and believe from such an application that the Insurance Company of North America carried or intended to carry $50,000 on said ship 'Obi,' distributed on the hull or other cargo of the said ship."

(Record, page 280.)

Thomas C. Hand, president of the Delaware Mutual Insurance Company:—

"In answer to this interrogatory, upon the facts stated therein, I am convinced that the inference would be that the Insurance Company of North America did not intend to carry a greater risk than $25,000 on the ship 'Obi' at the time of the application. It would be an open question whether it would be reasonable to think or infer from the application that the Insurance Company of North America carried or intended to carry insurance on anything else on the voyage named in this interrogatory than the sugar named in the application. It might cover sugar and hemp both. The risk that bore on a mixed cargo would not necessarily be stated in the application. The North America or the Delaware Mutual might have insured on both sugar and hemp by the same vessel, and they would be at different rates of premium. One is more susceptible of damage than the other, by the vessel even, and a company might choose to reinsure the sugar and keep the hemp, or reinsure the hemp and keep the sugar. It does not necessarily follow that the risk as stated in the application would bear on a mixed cargo. It would not be reasonable for the Hibernia Insurance Company to infer and believe from such an application that the Insurance Company of North America carried or intended to carry $50,000 on said ship 'Obi,' distributed on the hull or other cargo of said ship as the Hibernia Insurance Company say they presumed and believed. It is usual, in effecting insurance on an excess of the amount intended to be carried by the original insurer, to state that this reinsurance is in excess of the amount retained on vessel, freight, cargo, and specie, but that such a reinsurance will apply to cargo only; so that the reserve line is not intended to be the reserve for all interests. How this particular ship was insured I know nothing about."

(Record, page 281.)

In view of the evidence adduced above, it would seem to be abundantly clear that the pretension of the Hibernia that they

accepted these risks in ignorance of the true state of the facts cannot for a moment be sustained. They did have such notice in the clearest and most explicit manner, notwithstanding which they accepted the risks without objection and paid such losses as they sustained. They cannot now be at liberty to recover those losses. Their conduct in the past amounts to an admission of the true construction of the contract directly inconsistent with the claim now set up. Viewed in another light it evidently amounts to an estoppel of so forcible and efficacious a nature that it cannot be doubted that the court will lend its aid in common justice to enforce it.

The open policy No. 297 on excess was not issued by the Hibernia upon any understanding as to the retention by the North America of any stipulated sum or on the faith of any representation, or of any custom or usage to that effect.

In the case of the brig "Skerryvore," insured under policy No. 297, the Master applies precisely the principles found by him to be applicable to the other cases, without drawing any distinction between the circumstances under which that policy was issued and those which attended the issue of policy No. 268. The policy was an open policy on the excess of $50,000. The Master finds in effect that the North America was bound to retain in every case the full sum of $50,000 where it obtained reinsurance under that policy. As has been already shown in a previous portion of this brief, the mere fact that the policy was on the excess of $50,000 could not of itself bind the North America invariably to retain that sum. Companies holding such open policies are at liberty to reinsure as they please, either flat or on lower stated excesses. (Record, pages 108, 109.)

The finding of the Master can therefore only be supported (1) by some agreement similar to that under which it is alleged policy No. 268 was issued, or (2) by a custom or usage subject to which the policy was issued. Neither of these grounds is tenable.

(1.) Policy No. 297 is dated November 9th, 1881, and was issued more than a year after policy No. 268. It was a different form of policy, intended to cover a different class of risks and depending for its operation upon a different set of circumstances. The correspondence relative to it is not in evidence, and there is absolutely no proof that any representation whatever was made by the North America as to the retention of any lines in cases where it reinsured under it.

(2.) The only usage or custom claimed to be applicable is that already adverted to. It is unnecessary at this place to repeat what has been already stated at length as to the insufficiency of the evidence adduced upon this point. Whatever may be the view of the court upon the other branches of the case it is confidently submitted that the contention of the complainants as to this particular policy is totally without foundation.

The operation of open policies, the manner in which they attach *ipso facto*, and the distinction between them and other classes of policies will be found fully stated in the following cases:—

Harman *et al. vs.* Kingston, 3 Campbell, 150;
Wells, Fargo & Co. *vs.* Pacific Ins. Co., 44 Cal., 397;
Gladstanes *vs.* The Corporation of the Royal Exchange As'n, 34 Leg. J. (Q. B.), 30.

The North America acted in perfect good faith in all its transactions with the Hibernia. In every case it intended to retain and did retain a reasonable amount of risk, except in two instances, where by accident the reinsurances covered the whole risk. Such accidents are unavoidable in the common run of business and are so recognized by insurers generally.

The complainants in their bill make certain specific charges of fraud on the part of the North America, the truth of which they have wholly failed to sustain. These charges were in substance that "many of the reports of risks sent to the com-

plainants were false and untrue," and that the demands made by defendants on complainants "were predicated upon said false and untrue statements. (Record, page 5.)

The Master does not find that these charges are substantiated. It is nevertheless proper under the circumstances to show conclusively that the North America, far from being guilty of any fraud, acted with the utmost good faith throughout all these transactions and with the most scrupulous regard to honor and fair dealing.

The evidence of the president and vice-president of the North America is clear upon this matter. The president testified as follows:—

"Q. Has your company complied, or not, strictly and fairly and in good faith with all the terms and conditions of your policies with the Hibernia, and dealt in all things fairly with the complainant?

A. It has to the best of my knowledge and belief.

Q. Has your company given or not to the complainants all the knowledge and information it was in possession of as to the risks under the policies of reinsurance, and as to all losses or misfortunes thereunder as is usual, proper, or necessary to convey to reinsurers; and was this information given as soon as it could be?

A. To the best of my knowledge and belief it was.

Q. Was there ever on the part of your company any concealment of facts material to the risks, any neglect or failure to disclose the same as soon as known?

A. No, sir.

Q. Complainants charge that they are informed and believe that many reports of risks sent by your company to them were false and untrue, and were outside of the terms of your contracts with them. Please state whether your reports were correct or not, and whether sent to reinsurers as soon as possible, or not?

A. To the best of my knowledge and belief they were always correct, and were sent as soon as possible.

Q. Complainants charge that many demands for losses made upon them by your company were predicated upon false and untrue statements, and that a great many payments for losses made by them to your company were made in error, and induced by false and untrue statements, and that they are entitled to recover the same. Please state whether your statements of loss were true and correct statements, and your demands of payment for such losses justly founded, or not.

A. They were just and true to the best of my knowledge and belief in all cases, and our demands were properly founded."

(Record, pages 261, 262.)

The testimony of the vice-president is equally clear.

"Q. Did these defendants ever fail to report to the Hibernia, either directly or through Charles Platt, Jr., their agent and representative, all and any facts material to the risks being reinsured, or fail to disclose the same?

A. No, sir; they did not.

Q. Have you in all of such matters concerning the information you were required to give or should have given to the Hibernia Insurance Company, acted in perfect good faith?

A. Always in entire good faith.

Q. Have you always reported either to the Hibernia Company directly or through Charles Platt, Jr., all the facts material to the risks that you were asking reinsurance under?

A. If any facts material to the risks had come to the knowledge of the Insurance Company of North America, they never reinsured without stating those facts to the reinsuring companies.

Q. Including the Hibernia Insurance Company?

A. Including the Hibernia Insurance Company.

Q. Whether under policy 268 or under open policies?

A. Whether under policy 268 or any other policy.

Q. Or under open policies of this company?

A. Yes, sir.

Q. Have you ever strictly complied with the terms and meaning of all of your open policies as well as with the terms and meaning of policy No. 268?

A. Yes, sir.

Q. In good faith?

A. In good faith.

Q. Have these defendants given to complainants all the knowledge and information as to the risks under policies of reinsurance, and as to all losses and misfortunes thereunder, which were in their possession, and which it is usual and proper or necessary to convey to the reinsurers?

A. Yes, sir."

(Record, pages 195, 196.)

This evidence is substantiated by that of Charles Platt, Jr., the agent of the Hibernia, whose testimony is as follows:—

"Q. You are then perfectly familiar with all the reinsurance transactions between the complainants and defendants?

A. As far as I was as their agent interested in them; yes, sir.

Q. And the reports of risks were full and complete, all proper and necessary and material information given, and disclosure of facts made, and all premiums in each case and in all cases were duly paid by the defendants to the complainants through you?

A. Yes, sir; they were all paid. All proper disclosure of facts was made so far as I know."

(Record, page 189.)

And again:—

Q. The complainants state in their bill that they are informed and believe that the defendants have reported to them 'a great many other reinsurance risks upon which the complainants have paid to defendants divers claims and demands for special and general average losses which were false and untrue, and which were never within the terms of complainants' contract of reinsurance with the defendants.' State whether this charge of complainants' bill is true or not?

A. I should say false.

Q. Complainants also allege in their bill that they are informed and believe that 'a great many risks to which the complainants' several policies of reinsurance attached, and to which the complainants were and are entitled to be paid by defendants the usual premiums, have never been reported to the complainants, and complainants have received no credits from the defendants for the premiums that have accrued thereon,' Please state whether, to your knowledge, this charge in complainants' bill is true or?

A. It is not true to the best of my knowledge; no, sir."

(Record, page 188.)

No testimony could well be more decisive upon this point.

There is no allegation nor is there any pretense that the risks given by the North America to the Hibernia were not of the best character. The clearest proof of this fact is afforded by the circumstance that out of all the hundreds of cases in which reinsurances were effected (Record, 22 to 73), but thirteen are specified, either by the complainant or the Master as affording any ground whatever for complaint. Each one of these cases will be separately considered hereafter, and in each of them it will be shown that the North America acted in perfect good faith and with a complete belief that the risks were proper ones. As a demonstration of this good faith and of the reality of this belief it will be shown that the North America in every case intended to reserve for itself and carry a reasonable line upon the vessel, much larger than it placed at risk with the Hibernia. In eleven instances it did in fact retain such an amount of risk, and sustained, when the accident occurred, a

corresponding loss. In two cases only, those of the "Budstikken" and of the "Adele," did the North America have actually no line at risk. Both of these vessels were supposed, at the time insurance and reinsurance were effected, to have upon them much larger cargoes than eventually turned out to be on board. The reinsurances were, therefore, so large as to cover the whole of the actual amount of risk as eventually reported. The occurrences were purely accidental, and necessarily occur in the ordinary business of reinsurance. A full explanation is given in the testimony of the president of the North America, as follows:—

"I believe the case of the 'Adele' was simply that a loss occurred in going from her first port to her second port, and that, owing to a large amount of insurance having been noted—if my memory serves me right, $114,000—the company protected itself by reinsurance, and this reinsurance, unfortunately, being flat, attached to the loss. It is one of those accidents that have happened heretofore in the history of the company and will happen again. We have a case now, precisely similar, of a steamer loading cotton in Savannah. We are going to have the whole cargo, and the whole cargo is to be insured by this company, perhaps $200,000 or $300,000, $200,000 anyhow, and knowing that we were going to have the whole cargo, and knowing it is very difficult to obtain reinsurance on amounts of that size, we obtained a flat reinsurance in a certain company of $90,000, I think it was, and then, before the $90,000 worth of property was on board, the vessel took fire and the cargo had to be discharged; there, as a general average loss occurred—a loss occasioned by putting the water into the hold of the vessel to put out the fire, which is, of course, in the nature of a general average, this loss falls entirely on the reinsuring company, and not upon us, and they know it. We have another one on a steamer in Baltimore, the 'Barrymore.' Those two cases we have on hand now. It will frequently happen in a large business. You cannot avoid it. I would simply say it is an accident, entirely unintentional.

Q. Have you ever reinsured your whole line by any vessel intentionally without advice to the reinsuring company?

A. Never."

(Record, page 258.)

This testimony is amply substantiated by that of the insurance experts called to testify upon this question.

The following interrogatory was put to them:—

"Does it happen or not, at times, that in cases of vessels from distant foreign ports, such as on the Pacific or Indian Oceans, the particulars of

insurance and the knowledge of the amount actually at risk reach the original insurers only long after the occurrence of a loss?

To which they replied as follows:—

W. J. Comes, president of the Commercial Mutual Marine Insurance Company of New York:—

"It does so happen at times."

(Record, page 268.)

Ferdinand Motz, president of the Great Western Insurance Company of New York:—

"Yes."

(Record, page 269.)

Ransom B. Fuller, president of the Boston Marine Insurance Company:—

"News of loss very often reaches an underwriter long before the details of amount at risk can be known to such underwriter. In case of a vessel from the Indian or Pacific Oceans being actually lost soon after leaving port, the cable news of such vessel would be known in the United States from forty to sixty days prior to the receipt by consignee of cargo of shipping documents showing amount or value of such shipment."

(Record, page 274.)

Henry D. Sherrerd, president of the Insurance Company of the State of Pennsylvania:—

"It sometimes happens that in cases of vessels from distant foreign ports the particulars of insurance and the knowledge of the amount actually at risk only reach original insurers long after the occurrence of a loss."

(Record, page 280.)

Thomas C. Hand, president of the Delaware Mutual Insurance Company:—

"It frequently happens that in cases of vessels from distant foreign ports, such as of the Pacific or Indian Oceans, the particulars of insurance and the knowledge of the amount actually at risk reach the original insurers only long after the occurrence of a loss."

(Record, page 282.)

The evidence of Presidents Fourchey and Chalaron, called by the complainants, substantiate this view. President Fourchey testifies on the point as follows:—

"Q. Is it always possible, especially in case of a vessel between ports, to ascertain the amount carried until the particulars are furnished?

A. It is not possible.

Q. And in distant cases it takes considerable time?

A. Sometimes it does.

Q. Might not and does not under such circumstances it frequently occur that a loss happens before the particulars and amount have been received?

A. Not frequently. There are such cases, but they are very few."

(Record, page 224.)

President Chalaron testifies to the same effect:—

"Q. Is it always possible on a ship at a distance or between ports, on flat insurance, to have particulars until the particulars have been furnished?

A. No, sir. It is not possible.

Q. Does it not often take much time?

A. It depends on the voyage. It takes on a voyage from the Indian Ocean or the Pacific some six months before you can know the real amount on board.

Q. Might not on a voyage, on a distant voyage, a loss occur before it was reported?

A. Yes, sir."

(Record, page 228.)

The effecting of reinsurance in such cases, even though it be to such an extent as to leave the reinsured by accident no line, is clearly not fraud, nor evidence of fraud. Presidents Fourchey and Chalaron are, indeed, of opinion that it would amount to a fraud in such case for the company reinsured to endeavor to collect the whole amount of reinsurance without itself contributing to the loss to the extent of its usual line. But this opinion is clearly based upon the local custom of small companies in New Orleans as to the invariable retention of a fixed line, which has already been adverted to, and can certainly have no application to a case like the present, in which the methods of settlement must necessarily be determined by the practice in great commercial cities and among insurers

generally. (For a full statement of the evidence as to the method of settlement in such cases, see the statement of facts as to bark "Skerryvore" and bark "Adele," *infra.*)

But one additional matter requires consideration. The complainant avers, and the Master apparently finds, that the North America in entering into this transaction with the Hibernia was largely influenced by a wish to extend its business, and to enable itself to procure larger lines from its customers. The thought appears to be that the additional facilities for reinsurance procured in this way would promote these ends. This charge is absolutely unsupported by the evidence and is utterly repudiated by the officers of the North America. The president of the North America in his testimony says:—

"We did not obtain such reinsurance for the purposes named, and there has been no enlargement of the company's business on account of reinsurance so had with the Hibernia."

(Record, page 260.)

And the vice-president testifies as follows:—

"Q. The complainants state in their bill that the defendants made a contract with them specially, as I have understood their bill to be, for the purpose of 'securing for themselves a very large business and the complete control thereof,' meaning to secure for the defendants. Was that the special object of your business transactions with the Hibernia Company?

A. I would say in reply that the addition of a reinsurance policy not exceeding $10,000 would make no difference whatever to the defendants as to the securing of a large amount of business; and I would also say that I have never heard of the Insurance Company of North America soliciting reinsurance for the simple purpose of securing an enormous business, but that reinsurance is sought for by the Insurance Company of North America simply to keep what business they have on their books, and for no other purpose whatever, and to protect them as any conservative company should wish to be protected."

(Record, page 176.)

Beyond this plain statement it is deemed unnecessary to pursue the subject.

Statements of Facts as to Particular Vessels.

It is now proposed to consider in order the various cases referred to by the Master, restating the facts in each, so that a fair and just view of the circumstances may be obtained.

Ship "Obi."

Reinsured for $10,000 under Policy No. 268.

On June 7th, 1881, application was made to the agents of the North America in Boston for an insurance of a probable line of $45,000 on sugar on said vessel, from the Philippine Islands to Boston, which risk said agents accepted. (Record, pages 162, 163.) On June 7th, 1881, the Boston agents wrote to the Philadelphia office, advising a reduction of lines on all vessels from the East Indies likely to arrive in Boston after September 15th, owing to increased danger from storms, and specifying the "Obi" by name. On June 8th, 1881, the main office wrote to the Boston agents, instructing them to reinsure the excess of the risk on the "Obi" over $25,000. (Record, pages 130, 131.)

The Boston agents thereupon effected reinsurances on the excess of $25,000, as follows:—

Manufacturers'	$5,000
Northwestern National	2,500
Hibernia	10,000
Making in all	$17,500

Leaving to the North America a net line of $27,500. (Record, pages 211–263.)

The insurance in the Hibernia was placed by application to Charles Platt, Jr., who accepted it under policy No. 268, and, on June 11th, 1881, sent notice of the fact to Marshall J. Smith & Co. (Record, page 242), as follows:—

"*No.*

Insurance has been made in the Hibernia Insurance Company of New Orleans under open policy No. 268, for Insurance Company of North America, payable, in case of loss, to them, for $10,000 upon sugar, being

excess over $25,000 on board ship 'Obi,' at and from port or ports in the Philippine Islands to Boston, direct port.

When built, '64; where built, Y.; metaled, and special survey, 1880; tonnage, 1012.

Remarks, ; rate, 3¾, ⅝, 1, 7, 1.

Premium, 3¾ per cent., $.

CHARLES PLATT, JR.
By A. P.

PHILADELPHIA, June 11th, 1881."

On October 18th and November 8th, the amount actually at risk was reported to be $47,999. (Record, page 163.) The Boston agents forthwith reported to Charles Platt, Jr., that the whole risk had attached, and on November 22d, 1881, Platt sent to Marshall J. Smith & Co. notice of the fact (Record, page 242), as follows:—

"*To the Hibernia Insurance Company of New Orleans:*

The amount attaching on open entry of June 11th, 1881, under open policy No. 268, on sugar, per ship 'Obi,' is $10,000 at 3¾ per cent.; premium, $375; net, $255.

CHARLES PLATT, JR.
By A. P.

PHILADELPHIA, November 22d, 1881."

On November 25th, 1881, the Boston agents advised the home office of the amount of reinsurance effected. (Record, page 100.)

On February 20th, 1882, intelligence was received from the Bermudas that the vessel had put in there in a damaged condition. (Record, page 129.) The proportion of the loss paid by the Hibernia was $3521.37. It is not claimed that this sum was not properly chargeable, provided the North America had a right to reinsure with the Hibernia under policy No. 268, where it retained but $27,500 of the risk. The dates reported by the Master are wholly in error and are not supported by the evidence. The order to reduce lines was given on June 8th, and not on June 28th; and three days subsequent to this order, and in consequence of it, on June 11th, the application was made and the reinsurance in question effected. No such date as June 28th appears in the transaction. No advices to the

Hibernia, as to the amount actually at risk, were sent until November 22d, 1881, the particulars not having reached the agents of the North America until November 8th. The only questions raised are:—

(1.) Could the North America, having less than $50,000 at risk, reinsure under No. 268 with the Hibernia?

(2.) Did not the Hibernia have express notice by the form of application and statement made by Platt, that the North America did not have more than $25,000 at risk?

STEAMER "AVLONA."

Reinsured for $5000 under Policy No. 268.

In October and November, 1881, applications were made to Hampson, the Montreal agent of the North America, for about $82,300 on goods on above vessel from a port in the Mediterranean to Montreal. The amount of $40,000 reinsurance was placed through Charles Platt, including $5000 in the Hibernia, leaving to the North America a net line of $42,300. (Record, page 165.) Charles Platt, Jr., accepted the risk for the Hibernia, and on October 18th, 1881, notified Marshall J. Smith & Co. of a reinsurance "for $ upon cargo, excess over $25,000, not to exceed $5000. (Record, page 243.)

On October 31st. 1881, Hampson telegraphed the North America that on the 10th instant the "Avlona" had sailed from Cadiz, that the goods insured were reported to be worth $77,000 only, that he had effected $40,000 reinsurance, and was seeking $10,000 more in Boston. He requested the North America to try to reinsure $5000. (Record, page 124.) Neither of these reinsurances were effected. The net line of the North America stood, therefore, at $37,000.

On November 1st, 1881, an item appeared in the New York *Herald* to the effect that the vessel, under stress of weather, had made a jettison of part of her cargo, and had been towed into St. John's for repairs. (Record, page 135.) On November 4th Hampson telegraphed to the North America that the "Avlona" was expected to sail the day following from St.

John's, and that, if the North America thought a further reinsurance of the amount not reinsured desirable, to please wire M. J. Smith & Co. (Record, page 124.) The object of this suggestion evidently was to reduce the line still further in view of the dangers of the Gulf of St. Lawrence at that season of the year. It does not appear that any further reinsurance was effected.

On December 21st, 1881, the particulars of the risk already taken were communicated to the Hibernia, showing that they had had the full amount of $5000 at stake. (Record, page 243.)

The vessel reached Montreal in safety. The loss sustained was for repairs at St. John's and the jettison, which went into general average. The total loss sustained was $8665.74, of which the Hibernia paid $525.30.

In this case, the Master, assuming that the contract was only binding when notice of the amount at risk was given to the Hibernia on December 21st, 1881, finds that the North America was in default in not notifying the Hibernia at that date of the accident which had previously occurred. (Record, page 312.) This finding is clearly based on an entire misconception of the character of the contract. The risk was accepted by Platt, for the Hibernia, and the reinsurance closed on October 18th. It was, therefore, in full force when the loss occurred. The subsequent notice of particulars was merely in pursuance of an existing contract. The attempt to make it appear that the North America was guilty of a downright fraud is futile. Even the Master adds. "it is proper to presume respondent regarded the contract as attaching in its favor at the moment the condition upon which it was made to attach happened." (Record, page 312.)

The only questions in this case are the same as in the "Obi," viz.:—

(1.) Could the North America, having less than $50,000 at risk, reinsure under No. 268 with the Hibernia?

(2.) Did not the Hibernia have notice by the form of application that the North America had not more than $25,000 at risk?

BARK "YORKSHIRE."

Reinsured for $5000 under Policy No. 268.

In June and July, 1882, Hampson, the Montreal agent of the North America, accepted risks for $53,518 on freight, sugar, and advances on above vessel on a voyage from Barbadoes to Montreal. He reinsured $39,100 in various companies, including $5000 in the Hibernia, leaving to the North America a net line of $14,500. (Record, page 103.)

The application for the Hibernia reinsurance was made to Charles Platt, Jr., under policy No. 268, and was accepted by him December 21st, 1881. The $5000 was placed "flat." Notice was given to Marshall J. Smith & Co. by Platt, June 28th, 1882, that $5000 had been placed "flat," but the rate of premium was left open. (Record, page 244.)

It turned out that the amount at risk was $52,881. (Record, page 103.) And on June 29th, 1882, notice of the fact was given to Platt together with the rate of premium, who in turn communicated to M. J. Smith & Co. the same day the fact that the whole amount of their reinsurance had attached and the amount of the premium. (Record, page 244.)

On July 10th, 1882, news arrived that on July 4th, 1882, the vessel had struck a rock and had been abandoned at sea. (Record, page 134.) The Hibernia paid a total loss.

The sole question is whether under the circumstances the risk was properly placed with the Hibernia.

BARK "IMPI."

Reinsured for $5000 under Policy 268.

On August 26th, 1882, the home office of the North America received application for about $45,000 on goods from Philadelphia to Europe, and $1000 on advances on above vessel. The risks were accepted. They reinsured $10,690 in various companies, including $5000 in the Hibernia, leaving to the North America a net line of $35,310. (Record, page 166.)

The reinsurance was accepted for the Hibernia by Charles Platt, Jr., being "excess over $30,000, not to exceed $5000,"

and on August 23d, 1882, he notified Smith & Co. that the reinsurance had been effected. (Record, page 245.)

On September 1st, 1882, intelligence was received that the amount at risk was $39,690, leaving to the North America a net line of $30,000. (Record, page 166.)

On September 20th, 1882, notice was given to Charles Platt, Jr., of the actual amount of risk which had attached, and on the same day he notified M. J. Smith & Co. The amount was $3563. (Record, page 245.)

On November 11th, 1882, the news arrived that a loss had occurred by the vessel going ashore. (Record, page 166.) The amount contributed by the Hibernia as its share of the loss was $489.

The only questions are:—

(1.) Whether the risk was properly placed with the Hibernia.

(2.) Whether the form of application and notice did not sufficiently inform the Hibernia that the North America was not carrying $50,000 on the vessel.

Bark "Budstikken."

Insured for $5000 under Policy No. 268.

On September 20th, 1882, open insurance for about $35,000 was placed with Hampson, Montreal agent of the North America, on cargo and advances from Jamaica to Montreal. Hampson at once reinsured $20,000, leaving to the North America a net line of $15,000. (Record, page 163.) The smallness of the line is accounted for by the notorious perils of the Gulf of St. Lawrence in the late autumn. The vessel was not expected to arrive until November. (Record, pages 114, 115.)

Among the reinsurances was $5000 in the Hibernia, placed "flat" through Platt, who, on September 23d, 1882, notified M. J. Smith & Co. that the reinsurance had been made. (Record, page 245.)

On September 28th, 1882, Platt was notified that an additional premium of one-half of one per cent. would be paid on

account of the extra risk, of which fact he at once notified M. J. Smith & Co. (Record, page 246.)

On October 24th, 1882, the news arrived that the real amount at risk was only $18,958 on cargo, and $350 on advances; in all, $19,308. The $20,000 flat reinsurance more than covered, therefore, the whole risk. On November 26th, 1882, a total loss was reported. (Record, page 163.)

In settling the loss all the flat reinsurers paid in full except the Hibernia. It was specially favored by the deduction of $691 from its liability, being the total amount of over-reinsurance. The exact amount paid by it, after deduction for prompt payment, was $4288.45 only. (Record, page 116.)

William A. Platt, vice-president of the North America, testified as to this settlement as follows:—

"Q. You say that the Hibernia paid $4288.45. Why didn't they pay as much as the American Insurance Company?

A. Because it was thought proper. We had the option of dividing up the short interest between any companies we choose, so we deducted it from the Hibernia, as our relation with them has always been most friendly."

(Record, page 117.)

The reduction of the lines on the "Budstikken," so as to leave the North America no interest in the matter, was a pure matter of accident. Charles Platt, president of the North America, testified upon the point as follows:—

"It was, I should, say, an entirely accidental thing. It was the intention of the company to have carried its line on the "Budstikken," but owing to the facts (I suppose the details have been given; I would not like to bind myself down to any particular figure just now), but owing to the fact that the reinsurance was effected upon an amount which was reported open, and which was afterwards closed at a very much less figure, the reinsurance policies practically absorb the whole insurance. Certainly personally I would not have wished it, and I remember making the remark that I not only regretted that it happened, but that I would not have had such a thing happen, and did not want it to happen under any circumstances. It was a pure accident entirely."

(Record, page 258.)

That such accidents may and often do occur is plain from the testimony of the five insurance experts called. In addi-

tion to their evidence already cited on this point, the following interrogatory was put to them:—

"Is it or not usual and proper for an insurance company doing a large marine business with far and distant points, the facilities of advice from which are often imperfect, slow, uncertain, and the company's knowledge of the amount actually at risk consequently uncertain, to protect itself from excessive loss by reinsuring flat as well as on excess of certain amounts? And, if you answer yea, please state whether in such a case the original insuring company having secured both flat reinsurance and reinsurance on excess, either under open contract policies or directly, it might so happen in the event of a loss less than the excess reinsurance occurring before the cargo has been completed that such flat insurance may absorb, unintentionally and unknowingly to the company reinsured, the entire amount intended to be risked by the reinsured company. And in such case would or would not the reinsurers flat be the first and only ones liable for said loss, to the exclusion of the reinsurers on stated excess?"

(Record pages 266, 267.)

W. J. Comes, president of the Commercial Mutual Insurance Company of New York, answered:—

"I answer yes to the first proposition of the interrogatory. In the event of a loss occurring before the cargo has been completed such flat reinsurances might absorb unintentionally the entire amount intended to be at the risk of the reinsured company, and in such a case the flat reinsurances would be the first and only ones liable for the loss, to the exclusion of the reinsurances on stated excesses."

(Record, page 268.)

Ferdinand Motz, president of the Great Western Insurance Company of New York, answered:—

"It is proper for an insurance company doing business in the manner described in this interrogatory to effect reinsurance, both flat and on excess, either under open contract policies or otherwise. In case of a loss occurring before the cargo has been completed the flat reinsurances might absorb unintentionally the entire amount intended to be at the risk of the reinsured company, and in such case the flat reinsurances would be the first and only ones liable for the loss, to the exclusion of the reinsurances on stated excess."

(Record, pages 269, 270.)

R. B. Fuller, president of the Boston Marine Insurance Company, answered:—

"In events occurring as stated in the question it would very properly be the course pursued by the company expecting a large line, and it

might and probably would happen that in the event of the loss of the vessel and cargo partly loaded the flat reinsurers would pay in full and reinsurers of excess contribute *pro rata* for such amount as would be found to be their share of what was left."

(Record, page 276.)

Henry D. Sherrerd, president of the Insurance Company of the State of Pennsylvania, answered:—

"It is usual and proper for an insurance company doing business at distant points, where the facilities of advice are imperfect and the amounts actually at risk uncertain, to protect itself from excessive loss by reinsuring flat, as well as in excess of certain amounts. It might so happen in such a case that the original insurance company, having secured both flat insurance and reinsurance on excess, either under open contract policies or directly, in the event of a loss less than the excess reinsurance occurring before the cargo had been completed, that such flat reinsurance might absorb, unintentionally and unknowingly to the company reinsured, the entire amount intended to be the risk of the reinsured company, and in such a case the reinsurers flat would be the first and only ones liable for said loss."

(Record, pages 280, 281.)

Thomas C. Hand, president of the Delaware Mutual Insurance Company, answered:—

"An insurance company properly and frequently, when it does business with far and distant points, where the facilities of advice are imperfect, slow, and uncertain, and the company's knowledge of the amount actually at risk uncertain, protects itself from excessive loss by reinsuring flat as well as on the excess of certain amounts. In such a case the original insuring company, having secured both flat reinsurance and reinsurance on excess, on open contract policies or directly, it might happen, in the event of a loss less than the excess insurance occurring before a cargo has been completed, that such flat reinsurance may absorb, unintentionally and unknowingly to the company insured, the entire amount intended to be the risk of the reinsured company. In such a case the reinsurers flat would be the first and only ones liable for said loss, to the exclusion of reinsurers on the stated excess."

(Record, page 283.)

It clearly appears from this testimony that the transaction was a perfectly usual and valid one and the loss properly settled. The testimony of Fourchey (record, page 210) and of Chalaron (record, page 212) does not in reality contradict this. As already pointed out, the experience of these gentle-

men in the insurance business is limited. They both admit that the only customs with which they are familiar are the local customs of New Orleans, which certainly have no application in the present case. (Record, pages 225–227.) They both admit that in the usual line of their business it very seldom occurs that in reinsuring they do not know the precise value of the cargo reinsured. (Record, pages 223–227.)

The opinion of both is based upon a supposition as to the applicability of a local custom for every company to retain a fixed and invariable line in every case. As has been already amply shown, such a custom does not generally prevail.

Such evidence is clearly insufficient to outweigh that of experts from New York, Boston, and Philadelphia, absolutely unprejudiced and eminently qualified by their position and experience to establish the general customs and methods of settlement adopted in such cases.

STEAMER "PERUVIAN."

Reinsured for $5000 under Policy No. 268.

In November, 1882, a line aggregating $27,120 was reported to the North America from the Montreal agency, and about the same time $6500 from the Chicago agency, making in all $33,620. The voyage was from Montreal to Liverpool. On November 20th, 1882, application was made to the Hibernia through Charles Platt, Jr., for $5000 reinsurance "*flat.*" The risk was accepted by Platt, the rate being left open. This left to the North America a net line of $28,620. On November 29th, 1882, notice of the rate was given to Platt. (Record, page 166.) On December 5th, 1882, notice of a loss by collision was received. (Record, page 132.) The Hibernia paid, as its share of the loss, $693.46.

The only question here raised is whether the risk was properly placed with the Hibernia.

BARK "OCEAN."

Reinsured for $5000 under Policy No. 268.

On December 22d, 1882, applications were made to the North America for reinsurances on above vessel on a voyage

from Trieste to New York, aggregating $24,307. On December 30th, 1882, the rate of premium was fixed. Reinsurance was effected in several companies for amounts aggregating $8000, leaving to the North America a net line of $16,307. (Record, page 166.)

Of the above $8000 reinsurance, $5000 was placed "flat" with the Hibernia through Charles Platt, Jr., who on January 6th, 1883, informed Marshall J. Smith & Co. of the fact. (Record, page 246.)

A partial loss was reported, of which the Hibernia paid its share, viz., $693.46.

The only question here raised is whether the risk was properly placed with the Hibernia.

BARK "SKERRYVORE."

Reinsured for $1428 under Policy 297.

On December 16th, 1882, an open application for insurance was made to the North America for about $40,000. (Record, page 165.)

On January 2d, 1883, the particulars of the application were reported, amounting to $58,569. The voyage was from Havana to Boston. These applications were accepted by the North America, who effected reinsurance in all amounting to $28,569, leaving to the North America a net line of $30,000. (Record, page 165.)

The reinsurances were effected as follows: $15,000 was placed with the China Mutual Insurance Company on the excess of $30,000, and $5000 was placed "flat" with the Boylston Insurance Company. This covered the amount at risk, between $30,000 and $50,000. The balance of $8569 above $50,000 was distributed among various companies with whom the North America had policies on that excess, viz.:—

China Insurance Company	$2,857
Northwestern National	714
Delaware Mutual Insurance Company	3,570
Hibernia Insurance Company	1,428
In all	$8,569

(Record, page 165.)

The risk with the Hibernia was specially placed, January 7th, 1883, through Charles Platt, Jr., under open policy No. 297 on the excess of $50,000. (Record, page 247.)

On January 15th, 1883, news arrived that the vessel had been abandoned at sea on the 10th of January, so that a total loss was sustained. The Hibernia paid a total loss of $1428. (Record, page 166.)

In the above case the single question raised is whether the reinsurance was properly placed under policy 297. That policy was stipulated to be on the excess of $50,000 only. In the present case, the North America reinsured itself so that its net line was under $50,000. According to the uncontradicted testimony of the officers of the company, there was nothing to prevent their reducing their lines in such cases as they pleased. (Record, page 109.) It is the common practice of insurance companies to place reinsurances under policies on large stated excesses, and then to reduce their line by placing other reinsurances under policies on lower stated excesses, or "flat." This matter has already been fully treated at length. (*Supra*, page 63.) The only question is whether the alleged parol agreement of Charles Platt, Jr., and the alleged custom applied to the open policies as well as to policy No. 268. It is difficult to see upon what ground such a contention can be pressed. The Master entirely disregards this view of the case, and considers the insurance as though it had been placed under policy No. 268.

BARK "ADELE."

Reinsured for $5000 under Policy No. 268.

On January 26th, 1883, application was made to the Montreal agent of the North America for insurance amounting to about $114,000 on sugar laden on this vessel, on a voyage from Java to Montreal. The North America accepted the risks and reinsured $61,500 "flat," leaving to the North America, as was supposed, a net line of $42,500. (Record, page 164.)

Among the reinsurances placed as aforesaid was one for $5000 with the Hibernia through Charles Platt, Jr. This was placed "flat," February 1st, 1883, and on the same day notice

that the risk had been accepted was sent by Platt to M. J. Smith & Co. (Record, page 246.)

On February 15th, 1883, news was received by the North America that the "Adele" had sailed from Batavia with only part of her cargo on board, bound to another port in Java, there to take in the remainder. That on the way between the two ports she had sustained a loss of portion of her cargo, and that she had put into her port of destination in Java to refit, and take on board the rest of her cargo. (Record, page 117.)

The rate of premium having been left open, on April 27th, 1883, notice was given to Charles Platt, Jr., for the Hibernia of the rate fixed, and also that the full sum of $5000 had attached. (Record, page 246.)

On May 5th, 1883, further reinsurances were effected upon the vessel to the extent of $20,000. (Record, page 164).

On May 7th, 1883, the North America received intelligence that the vessel, when the accident occurred between the two ports in Java, had on board goods to the value only of $47,392, and that the loss sustained amounted to $20,819.80. (Record, page 164.)

On July 7th, 1883, intelligence was received that the value of the cargo placed on board at the second port was $42,689. (Record, page 164.)

The vessel arrived safe without any further disaster. The loss of $20,819.80 occasioned by the disaster aforesaid was shared by all the reinsurers, amounting to $61,500, whose risks had attached at that time. As these reinsurances were all "flat" they shared *pro rata*. The amount paid by the Hibernia was $1692.67. (Record, page 117.)

The additional reinsurance for $20,000, having attached after the accident only, did not, of course, contribute to the loss.

It will be observed that in this case, the amount of reinsurance effected by the North America was in reality so great as to leave the company without any line whatever upon the vessel. This, however, was evidently a mistake. The North America supposed, as has been seen, that she was carrying a large line. Mr. Platt, the president of the North America, explains the matter fully:—

"I believe the case of the "Adele" was simply that a loss occurred in going from her first port to her second port, and that owing to the large amount of insurance having been noted—if my memory serves me right, $114,000—the company protected this by reinsurance, and this reinsurance unfortunately being flat, attached to the loss. It is one of those accidents that have happened heretofore in the history of the company, and will happen again. It will frequently happen in a large business; you cannot avoid it. I would simply say it is an accident, entirely unintentional."

(Record, pages 258, 259.)

That this reinsurance was properly effected and the risk properly paid clearly appears from the evidence of the experts called upon the question. The following interrogatory was put to them:—

"Is it or not possible, reasonable, and in accordance with maritime usages for an insurance company expecting a line of, say, $114,000 on a certain vessel from a distant port, say Batavia, and willing to carry $25,000 as its own line, to protect itself by reinsuring flat and on the excess of $25,000; and in such case, and before the lines can be completed, and before the vessel has taken on board her entire intended cargo, should a loss occur, would or would not the flat reinsurances apply and be made to pay first, and then and after only the reinsurances on excess pay *pro rata* of the loss, if any there be, remaining to be covered, with the entire open line reinsured?"

To which they replied as follows:—

W. J. Comes, president of the Commercial Mutual Marine Insurance Company of New York:—

"It would be possible, reasonable, and customary for a company expecting a line of about $114,000 on a certain vessel to protect itself by reinsuring flat, and also on an excess of the line they are willing to carry. The flat reinsurance would first apply to the loss up to $25,000, and then the reinsurances on the excess over that sum, if simultaneous, would apply to the remaining amount of loss."

(Record, page 268.)

Ferdinand Motz, president of the Great Western Insurance Company of New York:—

"It is possible, reasonable, and customary for insurance companies expecting a line of, say, $114,000 on a certain vessel from a certain distant port to reinsure flat and also on excess of the line which they expect to carry. If a loss should occur, the flat reinsurances would first

become liable up to the sum of $25,000 intended to be carried by the reinsuring company, and after that the reinsurances on the excess over that sum would apply in their proper order."

(Record, page 269.)

Ransom B. Fuller, president of the Boston Marine Insurance Company :—

"Very often, and very properly, a company expecting a large line by any vessel may have open reinsurance policies attaching on excess, say, of $25,000; such amount of open insurance may be insufficient toward fully protecting the whole expected line. In such case flat reinsurance might be made; and in case of loss of said vessel prior to the completion of loading, the reinsurers of flat amount would come in and pay up to the amount of their policies accepted, provided there was such a sum at risk on board vessel at the time of such loss, and the reinsurers on excess would contribute to balance of loss incurred by the original insurance company after exhaustion of the flat reinsurance; and I would further state that in many instances one insurance company much prefers acceptance of flat reinsurance from another than to await particulars of open proposal; and if in such case a loss should occur before completion of vessel's loading, said reinsuring company would be called on to pay to the original company the latter's loss up to full sum so reinsured and at risk; and within a very short period such a case actually happened between the company of which I am now president and a company located in the city of Boston, and the reinsured company was fully reimbursed for the whole of its loss by the said company up to the whole amount reinsured by them, and no demurrer set up against so paying in full."

(Record, page 275.)

Henry D. Sherrerd, president of the Insurance Company of the State of Pennsylvania :—

"It is possible, reasonable, and in accordance with maritime usages for an insurance company accepting a line of, say, $114,000 on a certain vessel from a distant port, and willing to carry $25,000 on its own line, to protect itself by reinsuring flat and on the excess of $25,000. In the case as stated in the eighth interrogatory, the flat reinsurance might be called upon to pay the whole amount and the reinsurances on excess their *pro rata*. It is difficult to get at a thing of that kind exactly, because it is so uncommon an occurrence. The flat reinsurance might be called upon to pay the whole loss."

(Record, page 280.)

Thomas C. Hand, president of the Delaware Mutual Insurance Company :—

"In answer to the first portion of the eighth interrogatory I say that it is in accordance with maritime usages for an insurance company accepting a line of, say, $114,000 on a certain vessel from a distant port, and willing to carry $25,000. I should answer to the second part of the interrogatory that my opinion is that the company reinsuring flat takes the place, to the extent of that reinsurance, of the original insurer, and, if a loss occurs in the progress of loading of such a nature as not to prevent the vessel from completing her loading, the company reinsuring flat would pay a *pro rata* proportion of the loss, taking the whole amount that the original insurer had at risk. In the event of a total loss, with a part of the cargo on board, the company reinsuring flat might be compelled to pay that loss, without a contribution from any other company, to the extent of its reinsurance."

(Record, page 282.)

Nothing need be added to above evidence.

BARK "ETIMOLOGIA."

Reinsured for $5000 under Policy No. 268.

On October 15th, 1883, application was made to the North America for insurance on about $40,000 on grain from Philadelphia to the United Kingdom. On October 2d, 1883, particulars were furnished showing that the exact amount of the risk was $45,000. Reinsurance was effected amounting to $15,000, leaving to the North America a net line of $30,000. (Record, page 102.)

On October 23d, 1883, part of the above reinsurance of $15,000, to wit, $5000, was placed with the Hibernia "flat," through Charles Platt, Jr., who accepted the risk for that company. (Record, page 247.)

On December 13th, 1883, intelligence was received that the bark had stranded. The Hibernia paid a total loss.

The only point in this case is whether or not the risk was properly placed, under policy 268, with the Hibernia.

BARK "L. E. CANN."

Reinsured for $10,000 under Policy No. 268.

In March, 1882, applications were received by the North America for risks on this vessel amounting to $61,220, on a

voyage from Vera Cruz to New York. The risks were accepted, and $28,500 reinsured, leaving to the North America a net line of $32,720. (Record, page 148.)

On March 18th, 1882, $10,000 of above reinsurance was placed with the Hibernia through Charles Platt, Jr., who accepted the risk and the same day notified M. J. Smith & Co. The rate was left open, and on April 11th, 1882, Platt was advised of the rate, and that the whole risk had attached. (Record, pages 243, 244.)

The bark was a total loss by alleged barratry of the master. The Hibernia contributed, as its share of a compromise settlement, $2523.96.

The only question in this case is whether or not the reinsurance was properly placed under policy No. 268.

SHIP "MATCHLESS."

Reinsured for $10,000 under Policy No. 296.

In March, 1883, the North America received application for insurances on the cargo of this vessel from Iloilo to the United States, which it was supposed would amount in value to $140-000. The applications were accepted, and reinsurances placed amounting to $85,000, so as to leave to the North America an apparent net line of $55,000. (Record, page 128.)

The reinsurances were placed as follows:—

On the excess of $70,000:—
$10,000 in the Orient,
5,000 in the Ocean,
5,000 in the Salem,
15,000 in the China,
7,500 in the Boylston,
15,000 in the Boston Marine,
7,500 in the Shoe and Leather,
Making in all $65,000 on the excess of $70,000.
On the excess of $50,000:—
$10,000 in the Hibernia,
5,000 in the New York Mutual,
5,000 in the Insurance Company of the State of Pennsylvania,
Making a total of $20,000 on the excess of $50,000.

These reinsurance risks were originally placed March 20th, 1883.

On June 26th, 1883, intelligence arrived that the exact amount at risk was $123,488, and notices were thereupon sent of the amounts attaching upon the various reinsurances. (Record, page 167.)

The vessel foundered at sea near the island of Krakatoa, and was a total loss. In settling the reinsurances, the reinsurers on the excess of $70,000 were each called upon to pay only part of the amount at risk; while the reinsurers on the excess of $50,000, of which the Hibernia was one, were called on to pay the total amount of their reinsurance.

The only allegation of the Master is that the proper method of computation was not adopted in settling the loss. He was of opinion that all the reinsurers should have shared *pro rata*, and makes an award accordingly. This finding is based upon a misapprehension of the peculiar facts of the case. The reinsurers did not all stand upon the same footing. They did not reinsure on the same excess. Most of the reinsurers were liable only on the excess of $70,000. The Hibernia and two others were liable on the excess of $50,000. It is obvious that in distributing a loss in such case the reinsurers on the excess of $70,000 were liable only for the difference between that sum and the real value of the goods, which difference amounted to $53,488. But as this sum was less than $65,000, the total amount of reinsurance on the excess of $70,000, all of said reinsurers were obliged to pay only a ratable part of the claim.

It was quite otherwise with the reinsurers on the excess of $50,000, of whom the Hibernia was one. They were evidently liable to pay the whole amount of their reinsurance. The amount at risk between $50,000 and $70,000 was precisely filled by the $20,000 reinsurance which the North America had obtained on the excess of $50,000. There was, therefore, no shortage, of which the Hibernia could have the advantage. The method of effecting successive reinsurances on various excesses is amply explained in the evidence. (Record, pages 108, 109.)

The error of the Master is apparent. Policy 296 stipulates only that it shall "*apply* pro rata *with all other reinsurances on the same excess.*" Here the other reinsurances were not on

the same excess. The settlement was, therefore, perfectly proper.

SHIP "ADAM SIMPSON."

Reinsured for $5000 under Policy 296.

In October, 1883, applications were made to the North America, and accepted by it, for insurances which it was supposed would exceed $140,000, on goods from Iloilo to the United States. Reinsurances were forthwith obtained for $85,000, distributed as follows:—

$85,000 on the excess of $57,500;
$7,500 on the excess of $50,000.
(Record, page 138.)

The reinsurance was effected with the Hibernia through Charles Platt, Jr., and was, of course, on the excess of $50,000, as stipulated in policy No. 296.

On February 12th, 1884, particulars were received, showing the amount at risk to be only $91,344. Shortly afterward intelligence was received of the loss of the vessel in the Palawan Passage, and the total amount reinsured was collected from the Hibernia.

The Master in this case falls into the same error as in the case of the ship "Matchless." He assumes that the reinsurers were all upon the same platform, whereas in reality that was not the case. The reinsurances were effected upon different stated excesses. From the reinsurers upon the excess of $57,500 there was collected the difference between that sum and $91,344, the actual amount at risk, which difference was $33,844. This sum apportioned among $85,000 of reinsurance made a comparatively small loss to each of the reinsurers.

From the insurers on the excess of $50,000, however, the full amount was, of course, collected. The aggregate amount on that excess was $7500, which was just equal to the difference between the two stated excesses, $50,000 and $57,500. The reinsurers on the excess of $50,000 were clearly liable, therefore, for the full amounts reinsured. The Master is evidently wrong in holding that they should share *pro rata* with the reinsurers on a larger excess.

The North America is entitled to the sum of $209.65 due it from the Hibernia.

It will be observed that the Master has specifically reported (Record, page 317) that the Hibernia admits the correctness of this claim and says that it is ready to pay the amount whenever respondents show the risks mentioned were within the terms of the agreements. He refuses, however, to award the amount to the North America because evidence was not adduced before him to show whether the contracts upon which the claim is founded were within the terms of the agreements or not. If the position of the appellants in the above brief is sound, it is evident that there is no necessity for the production of such evidence. The account is printed on page 285 of the record and the reinsurances to which it relates are evidently under one or other of the five policies issued by the Hibernia. The reinsurances must necessarily have been properly placed. If they were placed under policy No. 268, the act of Charles Platt, Jr. in accepting them bound the Hibernia. If they were placed under any of the four open policies on excess, those policies attached *ipso facto*. No question can therefore arise as to whether the risks were within the terms of the agreement or not. And in view of the admission by the Hibernia that the amount is due, it is respectfully submitted that a decree should be entered to that extent in favor of the North America. It should be observed that in reality a larger sum is due to the North America. The account at page 286 of the record, verified by the evidence of William A. Platt (record, pages 198 and 199), shows that the actual sum due is $271.87, other items being added to both sides of the account. In order, however, to avoid a reference to a Master, the appellant is content to accept the sum of $209.65. The complainant's bill should, of course, in appellant's view, be dismissed.

J. BAYARD HENRY,
LAWRENCE LEWIS, JR.,
WILSON & SHELLABARGER,
Counsel for Appellant.

FILED.
NOV 18 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

The Insurance Company of North America, Appellant,

vs.

The Hibernia Insurance Company of New Orleans, Appellee.

October Term, 1889.

No. 138.

SPECIFICATIONS OF ERROR.

First.—The court erred in overruling the following exception to the Master's report: That the Master has not furnished with his report, though requested by the undersigned, the minutes of the proceedings held and of the evidence adduced before him, and that said minutes are necessary and would show the whole of the evidence introduced by both parties and considered by the Master, both documentary and verbal, as well as the requests made by the undersigned and admissions made by complainants' solicitor, none of which now appear of record as made, particularly the request of the undersigned that the admission, made voluntarily and spontaneously before the Master on March 12th, 1885, at the closing of the evidence at Philadelphia, in the presence of the president, vice-president, and the undersigned solicitor of respondents, that after

an examination of the books of the company and the testimony adduced in the case there was not the slightest ground for a charge of fraud, and that the company was vindicated in that respect, be noted and referred to by the Master in his report, and also the full admission of complainants' solicitor, made herein before the Master and at the request of the undersigned, in order to avoid further delay, not only that respondents paid certain claims for losses for which no special proof had been made, upon due proof of loss presented by them to complainants, but further, that Exhibit 132, offered by respondents to show a balance due them of $209.65 at that date, March 12th, 1885, by complainants for losses not yet reimbursed to them, was wholly correct and due as stated therein, and, as the Master added, that there was no dispute as to accounts, and would show that a large number of applications for reinsurance of respondents in hands of complainants have not been produced, though called for and promised to be attached to the particulars of reinsurance.

Second.—The court erred in overruling the following exception to the Master's report:—

That in the "facts" at page 303 of the report the evidence does not show, as stated by the Master, that "to compete profitably," and to meet the wants of customers, respondent was in the habit of accepting the whole amount of the risk any customer applied for on a vessel, "but that, on the contrary, the evidence shows that the respondents only accepted good risks, such as any good and competent marine company in the United States or elsewhere might and would take," and that not a single loss occurred in their transactions with complainants, the risks of which would not have been accepted by any company.

Third.—The court erred in overruling the following exception to the Master's report:—

That the definition of the "usual line," at page 303, by the Master, is not sufficient and may mislead, as, in fact, "usual line" means not an amount fixed absolutely as a limit to itself

by a company to carry or have at risk on any one vessel at any one time, but rather, it means an amount not governed by an inflexible rule, but varying very frequently, and even almost constantly, according to the vessel, the crew, the cargo, the nature of the voyage, the seasons, &c., as the evidence abundantly shows; and, moreover, the evidence shows that respondents in their large business have no absolute and invariable line of risks, they varying and forming their judgment as each case occurs.

Fourth.—The court erred in overruling the following exception to the Master's report:—

That respondents did not, as erroneously stated at page 303, make with various reinsuring companies only "open policy" contracts, but that the necessity of their large business often compelled them to reinsure flat, as well as on an excess, and that it is not correct to say that all "open policies" are necessarily based on a reinsurance of an excess, and these policies, though "open," may as well be made flat up to any amount that may be fixed beforehand between reinsured and reinsurer; the term "flat" meaning a fixed positive sum, not depending on an excess over the usual amount of risk held by the reinsured, but payable by the reinsured without prorating with excess reinsurers at once, provided there be a loss to that extent.

Fifth.—The court erred in overruling the following exception to the Master's report:—

That the report at page 303, previous to the quoting of letters of October 6th and 11th, 1880, on the question of the result of the conference between Marshall J. Smith and the Hibernia Company, does not refer to or give due and proper weight and effect, as it should have, to the evidence of Charles Platt, Jr., concerning the preliminaries and interests and motives of both himself and Smith & Co., as stated in his examination at page 179 *et seq.*; and, in fact, to the whole of the testimony of said witness, who was the witness of complainants themselves.

Sixth.—The court erred in overruling the following exception to the Master's report:—

That the report is erroneous in using, at page 305, the word "usual," which does not exist in the original letter of 11th October, 1880, in the following quoted line: "Of course all risks accepted by me will be such that the Insurance Company of North America carries their 'usual' line on;" that the testimony of Charles Platt, Jr., referred to at page 305 of the report, does not justify the deduction therefrom—quite the contrary—that neither the letter of Smith & Co. to Charles Platt, Jr., of 6th October, 1880, nor that of Charles Platt, Jr., to Smith & Co., of 11th October, 1880, were written for or on behalf of respondents, nor did they bind respondents, as principals, in any manner, as erroneously inferred and maintained in the report at page 305, said letters having been merely written between the parties, Smith & Co. and C. Platt, Jr., for their mutual benefit and for the benefit of complainants who desired to extend their own business, and neither of said letters being shown to have been communicated to respondents, whose only action in the matter was to have allowed Charles Platt, Jr., to obtain the agency and business of the Hibernia in connection with Smith & Co., also agents of the Hibernia, by enabling said Platt, Jr., to secure for his principals respondents' patronage in its large reinsurance business, following which promise of patronage by respondents the Hibernia issued to Charles Platt, Jr., to carry out and use this advantage it had thus gained, policy No. 268, of date October 13th, 1880, the whole as shown by the two letters themselves, by the terms and conditions and especially the limitation clause on the indorsement of said policy, which has always been in the hands and custody of said Platt, Jr.; by the evidence of said Charles Platt, Jr., from page 179 to page 190; by the evidence of William A. Platt, second vice-president and marine clerk during that whole time, page 98 *et seq.*: and by the evidence of Charles Platt, president for twelve years, and in the company of respondents since twenty-five years, page 253 *et seq.*

Seventh.—The court erred in overruling the following exception to the Master's report:—

That the report is erroneous in its construction, at page 305, of certain expressions in the evidence of Charles Platt, Jr., and in the inference therefrom, merely parts of said testimony being given, and not the whole of it, which, when read in its entirety, shows the very reverse of the Master's conclusion; and the report is also especially erroneous in stating that the word "usual" was used, and also in alleging that the statements of Charles Platt, Jr., therein set forth, were made in the presence and hearing of the president and vice-president, and are not disputed, *first*, because there was no need of disputing what was not admitted, but, in fact, denied by the witness Platt, Jr., and, *second*, because the vice-president, William A. Platt, continuing his cross-examination, at page 192 to page 198, immediately after the examination of Charles Platt, Jr., most emphatically and completely maintained the position and statements of Charles Platt, Jr., who was and is a marine insurance agent, having a totally separate and distinct business and office, and not having then, more than now, any connection whatever with respondents, except as it may occur in the line as insurance agent, and who states that respondents have no interest of any kind in policy 268 more than any ordinary reinsured company has in the business of the company reinsuring it, and that respondents had nothing at all to do with the issuing of said policy nor with its being carried out, more than to know that Charles Platt, Jr., had the authority under it to bind the Hibernia Company, his principal; and to the same effect is the testimony of Charles Platt, president of respondents' company, also taken after that of Charles Platt, Jr., from page 253 to the end thereof at page 263; and, moreover, objection on behalf of respondents was made that no letters of Smith & Co. nor C. Platt, Jr., nor doings, sayings, &c., of theirs, could be used against respondents, unless their privity therewith should be shown, and this was never shown, but the contrary was established; and another objection also made was that no change, addition, or alteration by parol evidence should be made against them, against respondents, in the policies alleged

against them, said documents being full proof of their own contents and of the obligations of each party under the terms thereof.

Eighth.—The court erred in overruling the following exception to the Master's report:—

That the report at page 305 is totally erroneous, *first*, in inferring that which is not only not proven in the least, but which is gratuitously assumed by the Master as a fact against direct evidence to the contrary, that is, that respondent had seen and approved the letters of 6th and 11th October, 1880; and, *second*, in assuming without proof "that the object of policy 268 was to reinsure the excess lines of the Insurance Company of North America usually carried," when the truth is that said policy does not in its terms even mention or hint at the words "excess lines," and when also this totally untenable inference of the Master is contradicted by all the witnesses who knew anything about the subject; and, *third*, in assuming against the terms of the policy itself and against the evidence that said policy 268, though nominally made with Charles Platt, Jr., was to reinsure respondents only on risks in excess of their usual lines; and, *fourth*, in its statement that Charles Platt, Jr., was acting for and representing defendants. (Page 305 of report.) All of which statements and conclusions are not justified in the least either by the contracts, the testimony, or the documentary evidence.

Ninth.—The court erred in overruling the following exception to the Master's report:—

Even admitting the alleged materiality of the alleged representations and of the alleged obligations thereunder of respondents (which they emphatically deny) under the letter of 11th October, 1880, concerning policy 268, nothing in said letter nor in policy 268, which grew out of it, justifies the Master's conclusion that the intention of the parties was to insure an excess above any definite amount or usual lines, no such expression being used, either in the letter or in the policy, and the policy being a contract, and clear and unambiguous in

its language, nothing can be added to it by implication or otherwise to change, alter, or vary it, and respondents have made formal objections to any such illegal alteration or inference; nor is the Master's conclusion justified that policy 268 is the same as policies 277, 296, 297, and 306, the language and terms of the four said last policies being far different from those of 268, the four last being open policies on a stipulated excess made by complainants to respondents themselves directly and attaching and operative *ipso facto*—policy 277, from the Spanish Main to ports in the United States, whenever respondents had at risk an excess over $60,000; policy 296, East Indies to United States, whenever respondents had at risk an excess over $50,000; policy 297, West Indies to ports in United States, whenever respondents had at risk an excess over $50,000; and policy 306, from ports in United States to ports in Europe, on cotton only, whenever respondents had at risk an excess over $70,000—whereas policy 268 in its terms is totally different and distinct, being issued by Hibernia Company to C. Platt, Jr., at request of Smith & Co. and C. Platt, Jr.; it, though an open policy, not attaching instantly nor operating by itself in the event of any stated condition, nor after any excess or any stated amount had been reached, but necessitating for its becoming operative a special application made by respondents directly, or through their several agents in other cities, to Charles Platt, Jr., as agent of complainants, for reinsurance to an amount specially stated in such application, the reinsurance under 268 being thus necessarily special, though it could be made at option either flat—that is to say, absolute and unconditional—or upon an excess over any stated or fixed amount. The terms of excess or of usual lines are not inserted in said 268, and the policy is more general and less restrictive, as it applies "at and from ports in the United States and foreign ports," thus being clearly made and intended for more general purposes than the four last-named policies; and also the reports of shipments and risks taken thereunder are made by Platt, Jr., to Smith & Co., the Hibernia's managers, through whose efforts, combined with those of respondents, part of the reinsurance business of

respondents was given to complainants so that they could use their unemployed capital (see whole testimony of Charles Platt, Jr., and the letters exchanged between him and Smith & Co.); and the Master is also in error in his statement connecting as one undivided act and holding respondents under the several notes attached to the policies, reducing the amount of reinsurance risks to $5000, the contrary being distinctly stated by the only witness to that effect, Charles Platt, Jr., and respondents not being shown, directly or indirectly, to be connected with nor interested in the change made at request of the Hibernia; nor is the Master justified by the evidence in his finding, at page 305, that "these facts lead me to believe the respondent was to retain its usual line when it reinsured with complainant, and the risks complainant was to underwrite were only such as it (respondent) retained its usual line on."

Tenth.—The court erred in overruling the following exception to the Master's report:—

The Master states erroneously, first at page 305, that "the usual line of respondents, as appears from the evidence, is $50,000, that generally they reinsured the excess of $50,000, and that this sum, therefore, was its usual line to be carried in all cases on risks with complainants under the contracts." The evidence shows quite the contrary, especially the uncontradicted testimony of William A. Platt, at page 168 to page 169, and also the uncontradicted testimony of Charles Platt, president of respondent company, from page 253 to page 263. This unwarranted assumption by the Master, of an absolute, fixed, and invariable $50,000 line for the sole purpose of securing such a small reinsurance as the Hibernia's, would be most unbusinesslike and contrary to all ordinary rules of marine insurance, and nothing but the most direct and positive and convincing evidence to that effect could justify the finding of such a condition of contract as a matter of fact fully proven, and to this effect we have the evidence even of Prevost, secretary and business manager of complainants, and of Fourchy and Chalaron, witnesses for complainants, all confirming in effect the statements of Charles Platt, president, and of

William A. Platt, vice-president and marine manager, and of the five presidents of five large marine companies of Boston, New York, and Philadelphia, taken under commissions, that risks are constantly varying in amounts for a number of ever-changing causes and circumstances, and that there is not, nor can there be, an absolute, immutable, unvarying sum at risk which can ever be called a usual line for any company for all vessels, at all seasons, on all voyages, &c., equally and always. The very statement of the Master's starting point of an invariable, usual line of $50,000, which he attributes to respondents, under the penalty of forfeitures of reinsurance on every vessel, at all times, from or to any ports, on all cargoes, is contrary and repugnant to the simplest business notions, and demonstrates forcibly its utter and intrinsic untenability. And the Master states erroneously, at second of page 305, that policy 268 would attach in favor of respondents on vessels and cargo only where the amount of the risks taken by respondents on any one vessel exceeded $50,000, a finding of fact entirely inferential, not substantiated by any evidence, when, on the contrary, the whole evidence, both parol and documentary, adduced in this cause, as well as the most ordinary and simple and businesslike construction and interpretation of a clear and explicit written contract, needing no outside evidence to explain its meaning, point out without doubt that policy 268 had no such restrictions imposed on it as those contained in 277, 296, 297, and 306, and that said 268 covered as to amounts all risks below $50,000, the higher risks being provided for, said risks being very numerous and needing some provision, as seen in the testimony of William A. Platt, and as to ports, it covered those ports which the Hibernia was seeking to reach, and which were not mentioned in the four last special policies, the Hibernia taking and receiving without grumbling or complaining its premiums during three years on numberless applications for reinsurance made specifically and accepted under 268, the applications and particulars all coming to the Hibernia through its agent C. Platt, Jr., and necessarily demonstrating on their face—at least all those made on excess, which were numerous—that the risks carried by respondents were very frequently on sums below and far below $50,000.

Eleventh.—The court erred in overruling the following exception to the Master's report:—

The Master's report from page 305 to middle of page 307 consists in noticing an application to reduce respondents' line on ship "Tonawanda," and quotes thereon letter to Smith & Co. of March 10th, 1884; and in noticing letter of March 2d, 1883, of Smith & Co. to C. Platt, Jr., asking him to notify complainants whenever respondents reduced their line, to which C. Platt, Jr., answered, in letter of March 7th, 1883, that he could not do so, having no facilities nor any information from respondents therefor; and in noticing letter of April 11th, 1881, alleged to have been sent by respondents to complainants for a policy covering an excess of $60,000, which application resulted in policy 277; noticing that on 9th and 10th November, 1881, respondent is alleged to have sent to complainants through Platt, Jr., two other applications for reinsurance policies, one from ports in East Indies and the other from ports in the West Indies to United States, and to apply on excess over $50,000, resulting in policies 296 and 297, forwarded to respondents through C. Platt, Jr.; noticing that on August 26th, 1882, respondents sent to complainants through C. Platt, Jr., an application for policy on cotton from United States to Europe on excess over $70,000, resulting in policy 306; all of which is noticed by the Master to show: First, that those contracts were made through C. Platt, Jr., acting for respondents; second, to show that in all those contracts and letters upon which they were based respondent was to carry its usual line as specified in said contracts; third, to show that those policies attached on the excess stated therein, up to $10,000, provided the risks were to and from the ports mentioned; and the Master concludes that when the two conditions of usual lines and ports mentioned concur, these policies apply, because, says he, "otherwise respondent could have reinsured on vessels of every character, seaworthy or not, and under circumstances the most hazardous, and could have reinsured the whole risk to save itself from loss, "which was never contemplated by the contracts; and, as all the policies and propositions for policies with complainants appear to have been

made through C. Platt, Jr., and copies of all applications and notices were transmitted to Smith & Co., who appear to have acted for complainants, and all demands for losses on risks reported were sent by respondent through Platt, Jr., to complainant, it appears, therefore, that C. Platt, Jr., acted as agent of respondent, and Smith & Co., in New Orleans, as agent of complainants, and as a further consummation of this finding a demand was made on Platt, Jr., to report particulars of risks as soon as taken, and this he could not do, as per his letters to Smith & Co. of September 15th, 1883, and of June 15th, 1883; and quotes from letter of June, 1883, that from July 1st, 1883, amounts of reinsurance by Hibernia will be reduced to $5000, as requested by letter of Smith & Co., of 9th June, 1883, showing, concludes the Master, that C. Platt, Jr., acted for respondents, and Smith & Co. for complainants, and further aids and supports the conclusion by the fact that complainant, on November 23d, 1883, notified respondent, through Platt, Jr., that it wished all its open policies with respondent canceled; all of this satisfying the Master that the business was for the respondent and that all that Platt, Jr., did was with its knowledge, approval, and direction. First noticing that letters of 11th of April, 1881, and of September 15th, 1883, are not in the record and do not appear to have ever been filed, and admitting, though not having them before him, the applications through C. Platt, Jr., by respondents to Hibernia (but not the alleged letters, which were never sent and are not in evidence), for open policies on excess Nos. 277, 296, 297, and 306, and admitting the letters on record exchanged between Smith & Co., and Platt, Jr., which have been cited and from which extracts have been given in the report, it does not follow, as the Master erroneously infers and concludes, that Platt, Jr., was the agent of respondents and acting for them and binding them by all his acts, doings, and sayings. On the contrary, Chas. Platt, Jr., Wm. A. Platt, and Chas. Platt, president, all concur in saying that such was not the case; that respondents had no interest whatever in the matter and did not correspond nor interfere concerning it, nor were they consulted, nor were they shown letters, nor did they give advice,

approbation, or assent to any of the acts of either the Hibernia or Smith & Co. or C. Platt, Jr. concerning this reinsurance business, except when and in so far as their own interests as reinsured were concerned, and then strictly for their own (respondents') interests; that respondents, merely as a favor to C. Platt, Jr., and to his friends in New Orleans, for the brokerage fees they might make out of it and for the premiums that might accrue to C. Platt, Jr.'s principal, the Hibernia, gave them a share of their large business and extensive patronage. The testimony explains fully, well, and satisfactorily why all the business was conducted through Platt, Jr., it being because of its convenience, its simplicity, the advantage it might bring in brokerage fees to Platt, Jr., and because, since the issuing of policy 268, C. Platt, Jr., had been, with his friends Smith & Co., the open and recognized agents of the Hibernia in all this reinsurance business allowed and promoted by respondents at the very request of the Hibernia, made through Smith & Co. and Platt, Jr., both agents of the Hibernia; and for these reasons it had been customary and was very natural that all communications should pass through the hands of Platt, Jr., not because he was respondents' agent, but because, on the contrary, he was complainants' agent.

When respondents wished direct open policies on excess they so requested and obtained them in their own name and not under a cover never needed. In fact, an agent of the Hibernia was needed in a policy such as 268, where no excess was stipulated as being the beginning of an *ipso facto* risk, and where, moreover, a direct application for reinsurance was required to effect the same and to render the policy operative. The letters quoted by the Master, as well as those not quoted by him and which have been overlooked—to wit, August 28th, 1882, September 4th, 1882, September 8th, 1882, September 14th, 1882, September 15th, 1882, June 18th, 1883, June 9th, 1883, November 23d, 1883, as well as all the other letters filed herein—instead of leading in the least to the inference that Platt, Jr., was the respondents' agent, lead, in fact, and when taken either separately or altogether, to the contrary inference, that he was the agent of the Hibernia, which latter, even in

the matter of the cotton policy, could not obtain from respondents that they deviate from their policy of reinsuring not lower than a certain sum—say $5000; and respondents, furthermore, not allowing the Hibernia the privilege of lowering its $10,000 reinsurance on excess of $70,000 *pro rata* of the lowering, so far as the respondents might lower their own risks, clearly showing that at that time the Hibernia did not have the pretension it has now that because their reinsurance policies attached over $50,000, or $60,000, or $70,000, therefore the reinsured respondents must carry the whole amount to destination and can never reinsure with other companies to reduce their risks; and, finally, letter of Platt, Jr., to Smith & Co., of November 23d, 1883, in which he states, "I have given notice to Insurance Company of North America that the Hibernia desires to cancel their open policies, in accordance with their terms, from this date, and I will accept no new business from to-day," which letter clearly indicates that he gave notice to the respondents and acted not for the latter, but as agent and representative of the Hibernia and at their request. The letter of June 9th, 1883, from Smith & Co. to Platt, Jr., is also to the same effect, and the whole evidence, even that of Prevost, secretary of the complainants, in his cross-examination, shows that the whole brokerage fees were paid to Smith & Co. and Platt, Jr., out of the premiums earned by the Hibernia, and which they were allowed to keep, and it follows necessarily that both Smith & Co. and Platt, Jr., were the Hibernia's brokers and representatives and not those of respondents. As the testimony on this is direct, positive, and uncontradicted it should be held as decisive of the question, and in not giving proper consideration, weight, and effect to the evidence adduced the Master is wholly in error in his decision on that point of agency, he assuming as facts that which was never proven, wholly neglecting and overlooking the facts proven in favor of respondents on the question at issue, the whole argumentation of the Master begging the question, presuming fraud as a close possibility—a matter which the law forbids to presume in any manner and which the law of ordinary business equally forbids to be and which cannot be

presumed in a respectable and flourishing insurance company—referring as proofs of a fact to acts of complainants which, as to defendants, could never be proof against them, as one cannot manufacture his own evidence to suit himself, and said argumentation being altogether groundless, erroneous, incorrect, and not flowing from the premises and true state of facts as developed by the evidence.

Twelfth.—The court erred in overruling the following exception to the Master's report:—

From the middle of page 307 of the report until the last paragraph at page 309 the Master states that complainants inquired into and knew of respondents carrying on vessels lines of risk far below the alleged and pretended usual line of $50,000, in which cases the losses had been paid by complainants, and he puts to himself the question whether respondents had a right so to do under the terms of the contracts, and quotes several cases as to material misrepresentations, and interprets the contracts in this manner: That, according to him, the complainants were bound on the marine risks only when respondents carried their alleged usual line, which he assumes to be invariably $50,000, and that complainants were not bound whenever respondents failed to carry $50,000, unless previous notice of such fact was given, and the risk after such notice accepted, and he quotes authorities on misrepresentation, even when not fraudulent, up to the last paragraph of page 309.

The first error of the Master is in misinterpreting the several contracts, which are clear and easily understood in their terms and are not really susceptible of nor amenable to any interpretation by means of outside evidence, none such being necessary, and the grave error of the Master consists in this misinterpretation and want of consideration of the whole evidence, and erroneously considering and commenting and passing upon part of the evidence, and entirely overlooking the rest thereof in determining, as a matter of fact, that policy No. 268 was that of respondents, that Platt, Jr., was their agent, and that their so-called usual line was positively and invariably on all vessels, voyages, cargoes, &c., exactly $50,000, and that

through Platt, Jr., and Smith & Co. they had so informed complainants, and that therefore, in all cases where respondents had taken risks below $50,000, and had reinsured under No. 268, and, having misrepresented the facts, the risks never attached, and they must return to complainants the several amounts of losses paid by them in such cases, less the premiums. The contracts are each separate and distinct, and must be considered each one by itself. There is no reason in the world to club them together in one mass, and then draw forced and unnatural inferences therefrom. Policy 268 was made general in its terms, from and to all ports, and was not limited as to amounts nor as to the method of reinsuring, whether flat or on a stated excess; was not an open, self-operating policy, but could only be put in force by specific applications for reinsurance in each and every case thereunder, whether the application was flat or whether on an excess; was issued to Charles Platt, Jr., a marine broker, by the Hibernia after conference with its friends and agents here, Smith & Co., for the mutual benefit of the Hibernia, Smith & Co., and Platt, Jr.; all the brokerage being paid by the Hibernia, as well proven. It appears, though, that the Hibernia, through Smith & Co., its agents here, limited Platt, Jr., to reinsurance with respondents, but for its own convenience or security if it did not wish to extend its operations further; and this line, taken for its own and sole benefit, could have been ended at any time by it and its agent, Platt, Jr. allowed to reinsure other companies to a large amount, and with all this respondents have no connection, interest, nor even knowledge, as shown in evidence. Why then should the Master call Charles Platt, Jr., the agent of respondents, and not the agent of the Hibernia, as he really was, any more than he would or could call agents of respondents the numerous other companies in Pennsylvania, New Jersey, New York, Massachusetts, and elsewhere, which did and do yet for respondents the same identical business of reinsuring them as did the Hibernia through Platt, Jr.? The facts do not warrant any such distinction or conclusion of the Master. As to a knowledge by the Hibernia, from the very inception, in 1880, up to the very middle of 1883, that re-

spondents very frequently carried lines less than $50,000, their very business knowledge should have taught them this, and they cannot now be heard to plead their own ignorance, if ignorance it ever was.

An insurance company takes what good business it finds, and if the amount of risk is too high it reinsures. As experts in the business the Hibernia should have known, and they did know, and were informed as a matter of fact, through both of their agents, Smith & Co. and Platt, Jr., that under policy 268 they had reinsured respondents on lines carried by them far below the alleged standard line $50,000, say on excess of $45,000, $40,000, $35,000, $30,000, $25,000, and even less. This is conclusively shown, and without doubt, by the very applications for reinsurance and particulars thereof, all under 268, sent to them by their agent Platt, Jr., through their other agents Smith & Co., and the Hibernia never raised a voice or interposed an objection until it happened that they made less money than they had anticipated out of the three years' transactions, though the evidence shows that the complainants received from respondents as much and even more premiums than they paid losses. I refer the Master to, amongst others, steamer Avlona, X 2, policy 268, on excess over $25,000, cargo, October 18th, 1881; bark Impi, X 5, policy 268, on excess over $30,000, wheat, August 28th, 1882; ship Obi, X 1, policy 268, on excess over $25,000, sugar, June 11th, 1881; and, in fact, if complainants had offered in evidence all their particulars of reinsurance under policy 268, it would be found that it is clearly demonstrated that in innumerable cases complainants had knowledge and information through Smith & Co., through Platt, Jr., through the applications for reinsurance and the particulars sent to them in so many cases under policy 268, and especially through the evidence of William A. Platt, second vice-president, and the marine clerk, taken from the books of respondents before the Master, and through the testimony of the five marine insurance presidents, taken under commissions, that complainants could not help knowing, and must have known, and could not have inferred otherwise from the above-cited reinsurance on less than excess over $50,000, that respond-

ents insured under policy 268, by special applications, all those risks which, either owing to their being less than $50,000, $60,000, or $70,000, or owing to their not being vessels to or from ports covered by the open policies which attached *ipso facto*, and were self-operative, could not be reinsured otherwise with complainants, and of this the latter could not help being and were cognizant and assenting thereto, and it thus appears that the alleged usual lines of respondents did vary as those of any other company in the world, and that the Hibernia knew it. The other policies, 277, 296, 297, and 306, are self-explanatory, being issued directly to respondents, and were also self-operative by the mere fact of respondents carrying on any one vessel over $50,000 or $60,000 or $70,000 on the voyages specified therein. They did not cover so much ground as policy 268, and only required of the respondents to notify complainants through their chosen agent, Charles Platt, Jr., of the probable amount of total risk, to be followed as soon thereafter as possible by the particulars.

The second error of the Master is in assuming that respondents did not fulfill their obligations under the contract to the letter, when the uncontradicted evidence clearly shows that they did fulfill honestly and completely all their obligations as a reinsured company under the several contracts cited; that they made true and proper representations, gave the proper and true particulars and notices, paid the proper premiums, and settled all losses for the best advantage of all parties concerned, and especially is it proven by the testimony that they did in effect and in every particular carry at their own risk their usual line on each vessel in each particular voyage, except in the two cases of the Budstikken and the Adele, which are fully explained, having happened by accident, and which, being stated in the interrogatories to the most expert marine insurers of New York, Boston, and Philadelphia, were considered as cases that might happen accidentally to any company, and this carrying of their usual line in every instance on each vessel is shown specially from respondents' books examined by the Master, in the testimony of William A. Platt, and of Charles Platt, president, and so much was the good faith and truthful-

ness and correctness of respondents then seen and made apparent that near the last day of the examination, in the presence of the president and vice-president aforesaid and of the undersigned solicitor, Mr. Sansum, solicitor for complainants, deemed it his duty to call the especial attention of the Master to the fact that he was satisfied there was no fraud that could be charged against the respondents; that they had shown the fairest and most honest dealings, and had kept their books in the clearest and most correct manner possible, which statement the Master is now called upon by the undersigned to make explicitly in his report to the court, it being set forth therein.

The third error of the Master is one of law when he assumes that respondents were bound in law and in equity, under policy 268, to carry a usual line, which line, though they did actually carry with the Hibernia, they maintain they are not obliged to carry at all, they pretending and maintaining, as a matter of right, that they may reinsure at pleasure even up to the whole amount of their risk, provided there be no fraud, and, on the excess policies, that they may reinsure with other companies below the excess without vitiating the reinsurance above said stated excess policies. As to the law quoted by the Master, it is quoted in error in that it is wholly inapplicable to the facts of this cause.

Thirteenth.—The court erred in overruling the following exception to the Master's report:—

The Master in his report, from page 309—"usage as applicable to contracts"—to page 310, refers to authorities on the subject and refers to testimony of Fourchey and Chalaron, taken on behalf of complainants, to the effect that they would not pay a loss reinsured when the reinsured carried no risk; states that this is the custom and that it is not disputed by any contradictory evidence; that he does not find evidence to sustain respondents' view; that Charles Platt, Jr., was the agent of complainants and that his knowledge was their knowledge; argues on page 310 and page 311 in an endeavor to show that Charles Platt, Jr., could not be and was not the agent of the Hibernia, stating the proposition as leading to an absurdity,

and concludes by asserting that "the evidence makes it very clear that policy 268 was made for the benefit of respondents only."

Respondents respectfully suggest that the Master is in error on the first proposition, as the question to be decided is not one of usage, but clearly and solely one of interpretation and effect of contracts, and therefore the law quoted finds no application, and that, even if it were considered a question of usage, the Master is yet in error, having merely examined the testimony and opinions of Fourchey and Chalaron, witnesses of complainants, and in not having examined, referred to, and given its full and due weight to the pointedly contradictory opinion of five experts, presidents of the largest marine insurance companies of the leading cities—of New York, Boston, and Philadelphia—some of these the neighbors and all the competitors of respondents, to wit: Ransom B. Fuller, president of Boston Marine Insurance Company; Henry D. Sherrerd, president of Insurance Company of the State of Pennsylvania, of Philadelphia; Thomas C. Hand, president Delaware Mutual Insurance Company of Philadelphia; W. J. Comes, president Commercial Mutual Insurance Company of New York; Ferdinand Motz, president of the Great Western Marine Insurance Company of New York, who all state that, as in the case of the "Obi" put them in the interrogatories, it would not be reasonable for the Hibernia to think or infer that the respondents carried more than $25,000 on that voyage; that it is not customary for companies to bind themselves to an invariable amount as to risks to be carried by them, and as to the payment of a loss in the cited case of the "Adele," where it was found that at the time of the loss and by accident the flat reinsurance covered more than was actually on board, they all declared, having been interrogated thereon, that the flat reinsurers properly paid the loss and were so bound. In fact, their evidence, taken under commissions, maintains fully and completely all the points as to usage and interpretation and effect of contracts, &c., asserted by respondents in their defense against the claim of complainants, and this overwhelming testimony as to weight and authority should be held superior to any

other produced here of estimable men, it is true, but who never have had such an extended and complete experience.

That the Master is in error on the second proposition, that there is no evidence to show that Platt, Jr., was agent of complainants, and that his knowledge was theirs, and that he could not be their agent, the reasons for this assignment of error having been fully stated hereinabove, the undersigned believing and respectfully setting forth that, in his judgment, the Master's argument is unfounded—in fact, proves nothing, and defeats itself; and as to the conclusion of the Master that the evidence shows that policy 268 was made for the benefit of respondents only, the undersigned begs leave to think and assert that in his judgment the whole evidence properly weighed shows exactly the contrary, the reasons of this assignment of error having been hereinabove fully set forth.

Fourteenth.—The court erred in overruling the following exception to the Master's report:—

From the preceding exceptions, if well founded, the Master is necessarily in error, and so he is, in the opinion of the undersigned, on all the special cases from page 27 to page 47 of the report, thirteen in number; and, the reasons for each allowance being detailed in each, the undersigned, for brevity, now sets forth that there is error in the Master's decision and finding of amounts in each and every case when he has found for complainants, and he will give a special assignment of error in such cases only as he may think are different from those where the general evidence and the law of contracts are involved. First, pages 313 to 317 of report, as to ship "Obi," the Master is in error, not only because of the reasons alleged in the preceding objections of the undersigned, but because, also, he erroneously assumes that due notice was not given to complainants, and that there is no evidence of the intention of respondents so to do, when the contrary is the case, respondents having acted therein in the usual manner and custom of marine companies; and the Master is also in error when he claims that, under the circumstances of the case, respondents should have given complainants' reasons for reducing.

Steamer "Avlona," page 312 of report:—

The whole statement of the Master here is incorrect and erroneous, and especially erroneous in the alleged fact that complainants had no knowledge that the respondents carried less than $50,000 on this voyage, and also in the alleged fact that respondents endeavored to and did obtain reinsurance with the Hibernia after knowledge of the loss and damage was known to them and published. The evidence discloses no such state of facts, but quite the contrary.

Bark "Yorkshire," page 313 of report:—

All error under the foregoing general exceptions, no special exceptions being deemed necessary in this case.

Bark "Impi," page 313: Same as "Yorkshire," the report itself setting forth knowledge of complainants in this special case.

Bark "Budstikken," page 313 of report:—

The error of the Master is, as usual, his mistaken idea of an absolute and invariable $50,000 risk on every vessel on every voyage on the part of respondents. As to the other facts stated, the evidence discloses that everything was done and notice given in due course of business and as promptly as possible, and the prorating of the loss was properly made, as well as it could be under the contracts of reinsurance of respondents with complainants, and if it be claimed that the *pro ratum* was not correct, the Hibernia, who profited by it, cannot be heard to complain, having no interest, and, moreover, this point having been raised only in argument here and not in Philadelphia, where alone it could have been explained if error there was, which is denied, it is now too late to make it, complainants being estopped. The fact of an accidental non-interest in the risk on the part of respondents has been fully and satisfactorily explained, the position of respondents being supported by the evidence taken under commissions. The loss was due and properly paid by the complainants as reinsurers, the Master being in error as to the facts and the law in this case.

Steamer "Peruvian," page 314: Same errors as alleged in "Yorkshire" above.

Barks "Ocean" and "Skerryvore," page 314 of report: Same errors as alleged in bark "Yorkshire."

Bark "Adele," pages 314 and 315 of report:—

The statement of Master is erroneous, and the facts were fully and correctly stated in the evidence of William A. Platt. The notices and information of loss and all other necessary particulars were duly given at a proper time, as soon as possible, to the reinsuring companies, including complainants.

Barks "Etimologia" and "L. E. Cann," page 315: Same errors as alleged for bark "Yorkshire."

Ship "Matchless," pages 315 and 316 of report:—

This statement is erroneous in fact and in law. The amounts to be paid were duly and properly prorated and paid both in equity and under the contracts between complainants and respondents, and even were the prorating improper, it is too late to urge it now, as it should have been urged in Philadelphia, and not here merely and for the first time in argument, respondents being taken by surprise after having called on complainants to disclose in Philadelphia all that they wanted to know, the whole source of information being there, and there being no means here of proving the correctness of the *pro ratum*. The complainants are, therefore, estopped from all claim on this ship, if any they really ever had, which is denied, and there is error in the allowance of this claim by the Master.

Ship "Adam Simpson," page 316: Same errors of the Master as alleged for "Matchless" hereinabove.

Fifteenth.—The court erred in overruling the following exception to the Master's report:—

There is error in not allowing claim "B 7" of respondents for a balance of $209.65, as, in addition to the admission of complainants stated by the Master, a further admission was made to save delay as to the correctness of the claim and as to its being allowed as good and regular and due, this admission being probably in the minutes of the proceedings had before the Master.

Sixteenth.—The court erred in overruling the following exception to the Master's report.

There is no equity in the claim of complainants nor in the award of the Master in their favor, as this suit merely claims repayment of the losses, and does not offer a repayment of premiums on the numerous other cases of risk below $50,000 under policy 268, in which there was no loss, and complainants yet keep the premiums, the evidence showing that the total amount of premiums received by complainants is larger than the total amount of the losses paid by them. Complainants will thus become rich at the expense of respondents, who, under the decision of the Master, will have run all the risks, whilst complainants, without any risks at all, since all contracts below $50,000 are invalidated by the Master, will have reaped all the benefits of the premiums paid without supporting any of the losses.

Seventeenth.—The court erred in overruling the following exception to the Master's report:—

One fundamental error of the complainants and the Master seems to be that they have assumed erroneously that it is the reinsured who is benefited, whereas the contract is, in its very nature, strictly commutative, doubtless; and if some one is benefited specially it is the reinsurer, who cannot leave his capital idle and who is always in search of customers for its employment. Such being the law of business, the Master is finally in error in this, that he has not applied in his findings that complainants, in order to recover must prove their allegations and charges clearly, conclusively, positively, and without the least doubt—a proof that they have not made, the undersigned respectfully contends; and he is furthermore in error in his examination and report as to the questions of fact and of law in so far as they concern respondents, who have not only successfully, as the undersigned believes, defended themselves against attack, but who have proven affirmatively the allegations of their defense, and who are therefore entitled to a dismissal of the bill of complaint and to a judgment in their favor for the balance due them.

Eighteenth.—The court erred in overruling the following exception to the Master's report:—

The Master is finally in error in this, that he has not applied in his findings the law that complainants, in order to recover, must prove their allegations and charges clearly, conclusively, positively, and without the least doubt—a proof that they have not made, the undersigned respectfully contends; and the Master is furthermore in error in his examination and report as to the questions of fact and of law in so far as they concern respondents, who have not only successfully, as the undersigned believes, defended themselves against attack, but who have proven affirmatively the allegations of their defense, and who are therefore entitled to a dismissal of the bill of complainants, and to a judgment in their favor for the balance due them.

Nineteenth.—The court erred in overruling the following exception to the Master's report:—

That the Master erred, even admitting that his views of the evidence and of the law and his conclusions are correct, in so far as he has expressed them in his report, in this, that if all the risks reinsured and taken under policy No. 268 below the Master's assumed usual line of $50,000 are void and contrary to the contract, as he declares, then he should have declared void and inoperative all the other risks below $50,000 in which no loss had occurred, and in which the complainants benefited by the premiums paid to them, and that in order to do so it is necessary that a full and complete account of all the risks under all and each of the policies be made by him, and the respondents credited with the premiums paid by them in all the cases where no loss occurred, as well as in those where a loss occurred, and was paid by complainants, the report of the Master being incorrect and incomplete as to the facts by the examination made by him of respondents' books, and it being believed and here asserted by exceptants that a full examination and report would show, as well as the evidence on the same does now partly show, that they are entitled—even admitting the views of the Master as correct—to

a return of a larger sum for unearned and untrue and erroneously paid premiums than the sum allowed to complainants by the Master.

Twentieth.—The court erred in entering a decree in favor of the complainants for $27,986.79 with interest from August 13th, 1884 (Record, pages 337 and 338), and in not dismissing complainants' bill.

ANALYSIS OF THE SPECIFICATIONS OF ERROR.

The court erred in dismissing exceptions to the Master's report, which were filed to the following effect:—

1. The Master erred in failing to file the minutes of the proceedings showing an admission by counsel for complainant that there was not the slightest ground for a charge of fraud, and that the North America was vindicated in that respect; and also an admission that the sum of $209.65 was due to complainants.

2. The Master erred in reporting that in order to "compete profitably" the North America was in the habit of accepting the whole amount of any risk that a customer applied for, the evidence showing that the North America only accepted good risks.

3. The Master erred in his definition of the "usual line" as an amount fixed absolutely, whereas the evidence shows that it varies in every case.

4. The Master erred in treating all the policies, including No. 268, as open policies on excess, whereas No. 268 had not that character.

5. The Master erred in failing to give due weight to the evidence of Charles Platt, Jr., touching the original conversation between himself and Marshall J. Smith & Co. as to the issuing of policy No. 268.

6. The Master erred in the construction of the clause in the letter of Charles Platt, Jr., of October 11th, 1880, and in holding that the North America was in any respect bound by any statements in that letter.

IN THE

Supreme Court of the United States.

October Term 1889.

No. 138.

INSURANCE COMPANY OF NORTH AMERICA

vs.

THE HIBERNIA INSURANCE COMPANY OF NEW ORLEANS.

MEMORANDA OF BRIEF, &c.

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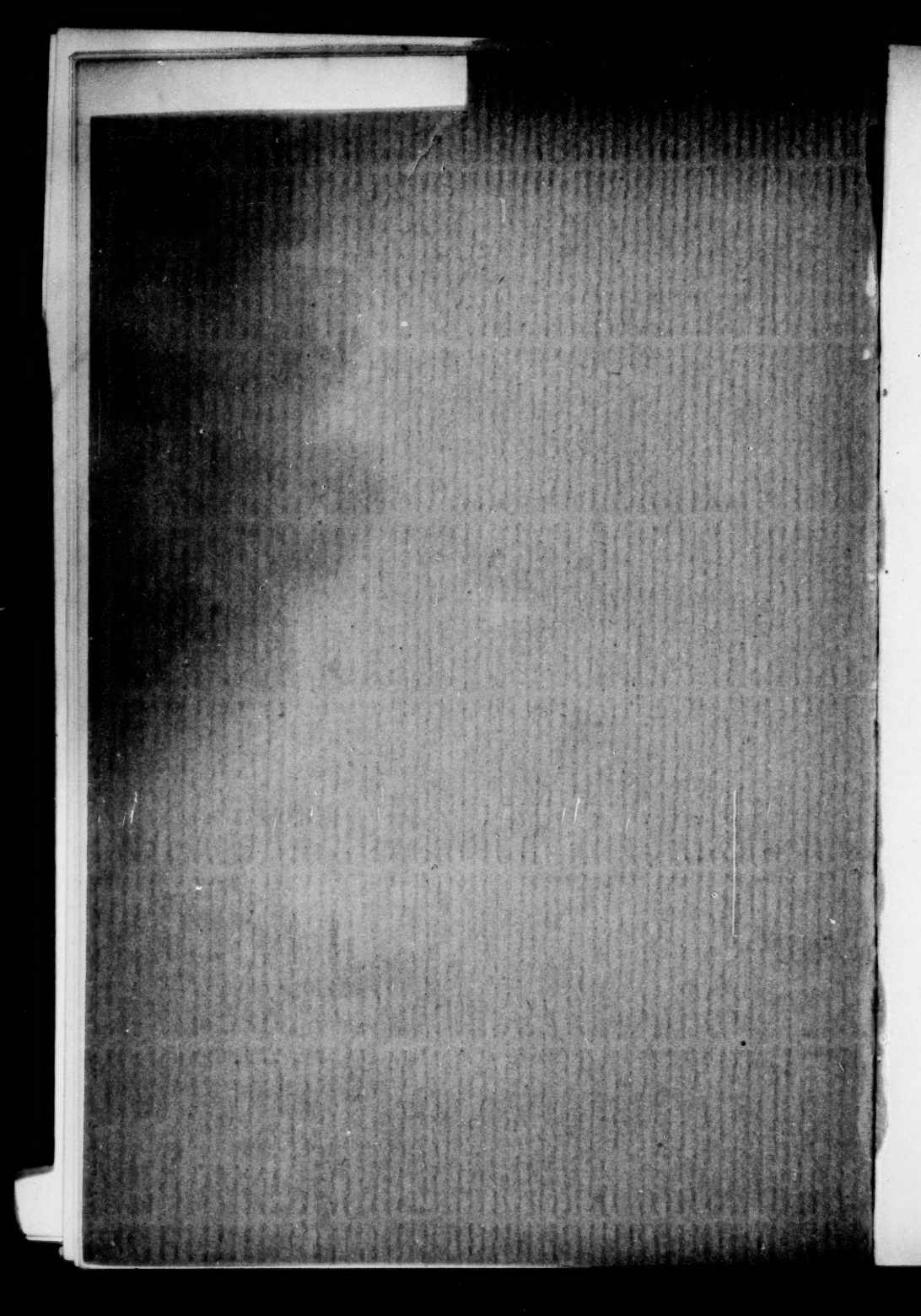

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INSURANCE COMPANY OF NORTH AMERICA
vs.
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No. 138.

Memoranda of Brief, &c.

The substance of this case is as follows:

1. The Insurance Company of North America in Philadelphia, and the Hibernia in New Orleans, were engaged in the business of insuring vessels against marine risks.

2. The Philadelphia company having insured against certain risks, which will be hereafter specifically mentioned, reinsured with the Hibernia Company. There were losses on these insurances, on account of which payments were made to the North America Company, and the bill was filed in this case to recover back the moneys so paid.

3. The grounds upon which this recovery was sought are stated in the bill (pages 1 and 2 of the Record), and may be summarized as follows:

(*a*) It is alleged that Charles Platt, Jr., of Philadelphia, was the agent of the Insurance Company of

North America, and, on behalf of that company, applied to the Hibernia Company to reinsure.

(*b*) That he represented, in making this application, that the reinsurance desired was only on the excess of those risks over the usual line of insurance, or the amount usually insured on any good vessel on any voyage; and that the *usual line* was $50,000.

(*c*) That upon these representations the appellee delivered to said Platt, nominally (but really to appellant), a policy of reinsurance, No. 268, to reinsure not exceeding $10,000, to attach only on the excess over $50,000, except as to vessels from the port of New Orleans, on which the risk was only to be $5,000.

(*d*) That afterwards, April 11, 1881, a separate policy, No. 277, was issued by appellee to appellant on the application of appellant to reinsure, not exceeding $10,000, on an excess of $60,000 on specie and merchandise from La Gusyra and other named ports.

(*e*) That on the 9th of November, 1881, appellant applied for and received another separate policy, No. 296, to reinsure, not exceeding $10,000, on merchandise from East India ports on the excess over $50,000.

(*f*) That on the 10th of November, 1881, appellee applied for and received another separate policy, No. 297, to reinsure risks on merchandise from West India ports not exceeding $10,000 on an excess over $50,000.

(*g*) That on the 26th of August, 1882, the appellee applied for and received another separate policy, No. 306, to reinsure, not exceeding $10,000, on cotton from ports of the United States to European ports on an excess over $70,000, with the reservation of the right to reduce the line of appellant below $70,000.

It is averred (p. 4) that it has long been the custom to make contracts of reinsurance on the faith that reinsurance is only on the excess of the "usual line" carried by the reinsured; that this means that the sum the reinsured is liable for is the amount over and above the sum "usually insured;" that reinsurance is never effected to the full sum originally insured unless special reasons therefor are disclosed; that such reasons are deemed material to the risk, and that these policies, other than 268, were delivered subject to these usages and customs, and only attached *pro rata* with all other policies on the excess.

It is to be observed that with reference to the policy first mentioned, *i. e.*, the one issued to Charles Platt, Jr., No. 268, the case rests upon alleged representations made by said Platt that it was only to apply in cases where the North America retained $50,000 at risk, while as to the other policies issued directly to the company (appellant) specific amounts are mentioned to the excess over which these policies might attach. It is then averred (without going into details) that divers demands for losses were made by appellant against appellee, accruing under these policies, which appellee paid. That, in each case named, the risk of appellant had been reduced below $50,000 by reinsurance, or that appellant did not originally have $50,000 at risk, and a decree is asked for the moneys paid on account of these reinsurances, where they were not on sums in excess of the usual line averred.

The answer denies that Charles Platt, Jr., was the agent of the appellant; denies that appellant had anything to do with policy No. 268, issued to said Platt, and avers that it was a policy to Platt, under which appellant applied for and procured reinsurances; that these were special risks without reference to lines carried.

Denies that there was a usual line of $50,000.

Denies the alleged custom.

It is important now to note the particular characteristics of these several policies.

POLICY NO. 268.

This was a policy issued to Charles Platt, Jr., on which reinsurances were effected. (Rec., p. 77.)

It is to Charles Platt, Jr., "for account of whom it may concern." There is nothing in it to limit its application to an excess over any sum. It is only claimed that Platt represented that it should not be used except where the North America retained $50,000 at risk.

All the policies except No. 268 contain a stipulation that the reinsurance was to be on the excess over an amount named in the policy — two on an excess of $50,000, one on an excess of $60,000, and one on an excess of $70,000

Policy No. 268 not only contained no words limiting reinsurance under it to any excess, but there was also no limitation as to ports or character of cargo. On the contrary, by its express terms it was to apply "at and from all ports in the United States and foreign ports, upon all kinds of lawful goods, merchandise," &c.

It was an open policy, upon which reinsurance could be effected. No insurance attached to it *ipso facto*, but before any risk attached application must be made to the reinsuring company for the reinsurance desired. That application might be for reinsurance "flat," *i. e.*, for a specific sum, irrespective of any excess, or it might be for an excess over a stated sum, but no insurance attached until such application and acceptance.

The other policies were of a wholly different character.

On the face of each, it was stated that it was to apply to the "excess" stated in the policy.

These were issued directly to the North America Company by the Hibernia Company.

No application was necessary to be made in order to make the reinsurance risk attach, but it was a contract that it should attach to the excess whenever the North America should insure over the amount named. For example, if it was on an excess over $50,000, and the insurance was for $55,000, it instantly attached to the excess of $5,000, and if the North America had a dozen policies of like character on the excess over the same limit, with as many different companies, all attached alike, and the $5,000 would be distributed, in case of loss, among all the companies that had issued such policies.

And it is further to be observed, as to these policies, that there is nothing in them that binds the appellant to retain a risk up to the limit named. The contract is, that reinsurance shall only be for the excess, but it does not, in terms or by implication, prevent the insuring company (appellant) from reinsuring below that limit—*e. g.*, if the insurance was for $55,000, the limit $50,000, the reinsurance would attach *ipso facto* to the $5,000 excess, and the appellant might then reduce its risk to below $50,000 by flat insurance with other companies, or by having other open policies with other companies on a stated lower limit.

Now, this policy No. 268, being of the character above described, under which no reinsurance could attach except upon application and acceptance, and upon which reinsurance could be effected, either flat, *i. e.*, for a specific sum (if so applied for), or on some stated excess (if so applied for), the attempt is made in this case to change this contract by importing into it the condition that it should not be used except as to cases where the North America carried or retained a line of $50,000; and to support this the appellee relies

upon what is claimed to be a representation contained in a certain letter written by Charles Platt, Jr., before the policy was issued, and upon the assertion that the North America carried a "usual line" of $50,000, and upon the alleged custom.

As to this alleged custom, it is perhaps not necessary to say more than that there is in this policy No. 268 no latent or patent ambiguity in any of its terms.

It is a plain, unambiguous contract fixing the rights of the parties to be as already stated, and no usage can in any way change it.

In the case of Hearne *v.* Marine Insurance Company, 20 Wallace, 488—

> Usage is admissible to explain an ambiguity, but it is never received to contradict what is plain in a written contract. * * * In no case can it be received where it is inconsistent with or repugnant to the contract. Otherwise it would not explain, but contradict and change the contract, which the parties have made—substituting for it another and different one, which they did not make.

> "Evidence of usage is not admissible to contradict or vary what is clear and unambiguous, or to restrict or enlarge what requires no explanation. Omissions may be supplied in some cases by such proof, but it cannot prevail over or nullify the express provisions of the contract. So where there is no contract proof of usage will not make one, and it can only be admitted either to interpret the meaning of the language employed by the party, or where the meaning is equivocal or obscure."
>
> Savings Bank *v.* Ward, 100 U. S., 206.

> "Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement or to explain the terms of a written contract. In all cases where evidence of usage

is received, the rule must be taken with this qualification, that the evidence is not repugnant to or inconsistent with the contract."

Tilley *v.* County of Cook, 103 U. S., 162.

Nearly all of the reinsurances complained of in this case were under this policy No. 268.

These reinsurances were effected, as they only could be, by special applications, either for "flat" insurance or on a stated excess.

Such applications were made and accepted, an illustration of which is found in the case of the

SHIP "OBI."

The application was made to Charles Platt, Jr., and was accepted by him, and notice of such acceptance was given (Rec., p. 242), from which it appears that it was for $10,000 "excess over $25,000." The insurance and reinsurance on this vessel stood as follows:

SHIP "OBI."

Insured by North America		$45,000
Reinsured in Manfacturers'	$5,000	
Reinsured in Northwestern Mutual	2,500	
Reinsured in Hibernia	10,000	
		17,500
		$27,500

Here, then, is a case in which the appellant did not retain a line of $50,000; did not have $50,000 at any time, but reinsured as just stated, and retained only $27,500.

And it is sufficient for the purposes of the argument of the case, without giving details of figures, with reference to each reinsurance complained of, to say that, as

to most of the reinsurance under this policy, the same fact exists, viz., that the appellant did not, after reinsuring, have a risk retained of $50,000.

Now, the question is, taking the "Obi" as an example, can the amount so paid be recovered back, having been paid under this policy when the appellant did not retain a line of $50,000?

The right to recover this sum must depend upon the establishment by appellee of the averments that Chas. Platt, Jr., was the agent of the appellant, and represented that that company would carry a line of $50,000.

It is not claimed that the company did not carry a risk; and hence we are brought to the question whether Chas. Platt, Jr., was the agent of the appellant company, and made such representations, for it is upon his alleged representations that the appellee must rely to recover; the alleged custom that the reinsuring company does not reinsure the entire risk, but continues to carry a risk, can here have no application, because it did retain a risk.

His relation to this business appears by this record as follows:

1. He was an insurance broker in the city of Philadelphia.

2. Marshall J. Smith, of the firm of M. J. Smith & Co., New Orleans, was the manager of the Hibernia Company.

3. Marshall J. Smith called on Platt in Philadelphia, and what occurred is stated by Platt, Jr., in his testimony, at pages 179–183, the substance of which is that he asked Platt to ascertain whether the appellant would place reinsurance with appellee.

4. On the return of Smith to New Orleans he wrote Platt a letter (R., 231):

OCTOBER 6, 1880.

CHARLES PLATT, Jr., Esq., Philadelphia.

DEAR SIR: Our Mr. Smith has returned home, and begs to refer to his *conversation with you* in regard to reinsuring here the excess lines of the North America.

We have consulted with the officers of the Hibernia Insurance Company, "a branch of which company is under our management," and we propose to take a proportion of the general reinsurance of the North America, excepting coastwise risks from New York, of which business, at the present rates, we believe the North America does little.

The Hibernia will carry a line of $10,000 on all foreign business of the company at all ports excepting New Orleans. From New Orleans the line must be limited to $5,000, as the Hibernia often have a line from their customers, and they may unknowingly double on a vessel. The Hibernia will allow twenty-five per cent. rebate, *and to you a brokerage of 5 per cent.*

Should you be able to arrange this, please notify us at once. The Hibernia Insurance Company has a capital of $400,000, paid up, is conservative, and we look upon it here as in every way first-class for the amount of risk they will assume.

Yours truly,

M. J. S. & CO.

5. In reply Platt, Jr., wrote as follows (R., 231):

PHILADELPHIA, *October 11, 1880.*

MARSHALL J. SMITH, Esq., New Orleans.

DEAR SIR: Your valued favor of the 6th instant is received, and I note contents with care.

The Insurance Company of North America, through me, will be glad to enter into the reinsurance arrangement with the Hibernia on the terms named. I enclose herewith a policy I had with the Home Insurance Company of Newark, N. J., which you can take a copy of on a Hibernia policy, making the sum insured $10,000. Please send me the policy, and I can begin at once. Of course all risks *accepted by me* will be such that the Insurance Company of North America *carries their line*

on, and all risks that are bound by me will be held by the company, as it will not do to have any cancellations. Shall *I report all risks to you*, or the Hibernia Company direct? I see no reason why the arrangement should not prove a success, and I will do all I can to make it so. The most part of it will be grain and general cargo from Atlantic ports to Europe. Please return the home policy.

With many thanks, and regards from Mr. Prictet and myself, I am,

Yours very truly,

CHARLES PLATT, JR.

6. Pursuant to this, policy No. 268 was issued to Chas. Platt, Jr., "for account of whom it may concern." (Rec., p. 77.)

7. When reinsurance was desired under this policy the North America (appellant) applied to Chas. Platt, Jr. He put it in form on a blank, and forwarded it to the Hibernia. (Rec., p. 187.)

8. Chas. Platt, Jr., *accepted* the reinsurance. (R., pp. 242, 243.) The premiums were paid to him by appellant, and his commissions were paid by appellee.

9. In addition to this is the testimony of the officers of the appellant company that Platt, Jr., was not the agent of that company, and the testimony of Platt is to the same effect.

What has been now referred to constitutes the evidence as to whose agent Chas. Platt, Jr., was; and it may be summarized as follows:

1. The manager of the Hibernia Company (appellee) applied to said Platt to see if he could make an arrangement by which the appellant company would place reinsurance with the appellee.

The manager afterwards wrote to Platt that the Hibernia would make reinsurance, and would allow Platt a brokerage of 5 per cent., and Platt replies that the appellant company will enter into the arrangement.

When the appellant company wanted reinsurance application was made to Platt; he *accepted* it *under* the policy issued to him, and notified appellee, and appellee paid his commissions.

Upon such a state of facts, we submit that in all matters pertaining to effecting this reinsurance he was the agent of the appellee; and, being the agent of the appellee, his representations could not affect the appellant.

The argument of the master in support of the appellee's contention that Platt, Jr., was the agent of appellant is on page 310 of the Record, as follows:

> Policy 268 was made by complainant with Charles Platt, Jr., and is upon its face a contract to Charles Platt, Jr., for account of whom it may concern. It is to him in name for the benefit of others contemplated by the parties.
>
> Complainant is one party to this contract and Charles Platt, Jr., is the other party to it. How, then, can Charles Platt, Jr., ever be complainant's agent under this contract? It is not a contract conferring authority of agency upon Charles Platt, Jr.
>
> This form of contract is not new. Such contracts are outstanding in the hands of merchants in the maritime ports of the world, and have been in use for hundreds of years. I do not find it asserted that a merchant who holds a policy of reinsurance, insuring him by name for account of whom it may concern, is the agent of the party making the policy. To say that A, if he contracts with B for the benefit of an undisclosed principal, thereby makes B his agent, is simply saying that A is contracting with himself; for, if B is the agent of A, then A is contracting with A, and there is no second party to the contract.
>
> Suppose the Hibernia Insurance Company (com-

plainants) had refused to pay a loss under policy 268, could respondent have brought suit on that policy? If so, how? Either the name of Charles Platt, Jr., as nominal principal, or in the name of respondent, averring the contract policy 268 was for its account.

In policy 268 Charles Platt, Jr., is named as one of the principals. The other principal is complainant. If Charles Platt, Jr., is one of the principals, even a mere nominal one, could he be the agent of complainant at the same time under the terms of that contract?

Assuming Charles Platt, Jr., to be the agent of complainant, does not every step in proceeding under that contract lead from absurdity to absurdity?

Why should complainant call in Charles Platt, Jr., to make a contract with itself?

What obligations could arise from such a contract?

This entire argument rests upon the fact that the policy was made to Platt, Jr., for whom it might concern.

The answer to this is not difficult. It is found in the fact plainly appearing in this record that the Hibernia Company wished to get a part of the reinsurance which the appellant had to place, and applied to Platt to accomplish this. This policy was made to him as a matter of convenience, and he was authorized to do what he did do—*accept* reinsurance for the Hibernia Company. For this purpose he was the Hibernia Company, and the policy was simply the convenient method of placing this reinsurance instead of sending the applications to New Orleans.

When the master finds such serious difficulties in the way of our contention that it makes the Hibernia Company to be contracting with itself, if Platt is its agent, we suggest one much more serious and troublesome by the inquiry, if Platt was the agent of the appellant, how could he, on the application of the appellant to him (as appellant's agent), *accept* for the Hibernia Company that insurance?

That would be appellant making a contract with its agent to bind the Hibernia. That could not be; and the only rational position that can be assigned to him is that of agent of the Hibernia. Being its agent, he could receive applications and accept insurance, and not otherwise.

But if he was agent of the appellant, still there was no representation made by him or by the appellant such as that averred in the bill.

All the representation he made is contained in his letter—a mere promissory statement that he would not *accept* any that the appellant did not "*carry their line on.*"

But there was no representation that the line was $50,000, or any other sum.

The most that can be said of this phrase in this letter, assuming that Charles Platt, Jr., was the agent of appellant, is that it is a promise not to apply for reinsurance except where appellant carried *their line.* It is a promise made before the policy issued. The policy contains no such stipulation or promise.

There was no contract until application made and accepted. It is not pretended that there was any promise or representation made at the time of the application under the policy. Hence all of representation that was made is that promissory representation in that letter, if it can be regarded as a representation at all.

It is not easy to see how it can be regarded as a representation. When Platt, Jr., said I will not *accept*, except upon such as the North America carries their line on, it requires violent construction to make this a promise, or representation, by appellant.

The effect of such promissory statement has been fully discussed by Mr. Lewis in his brief at pages 72 and 75, and the authorities cited, to which we add May on Insurance, secs. 181, 182.

Attempt to Change Platt's Alleged Representation.

It is sought to change these words "carry their line on" to "carry their *usual* line on." If the letter of Platt is treated as a representation, its language cannot be changed by evidence.

The word "line" has a definite signification. It means the risk that a company has on a particular vessel, and as to this there is no uniformity, and cannot be; and if Platt was the agent of appellant, and promised that the risk should only be in cases where appellant carried "their line," it could only mean that reinsurance would only be applied for, under this policy, in cases where the appellant carried a line on that vessel, *i. e.*, retained a risk.

But the words "usual line" (if they have any meaning) would make the policy only apply to an average of all lines, or to some fixed, definite sum up to which the company would, and beyond which it would not, go.

This is the material change that is sought by appellee to make in this contract by usage, and other evidence, which we are resisting.

If this change cannot be made in the contract, then it follows that all allowances that have been made by the master (which will presently be specified) against the appellant on reinsurances, where appellant carried a line of which the "Obi" is one, were erroneously allowed.

But again: If it be assumed that the word "usual" can be inserted, since it is averred that their usual line is $50.000, the burden of proving that averment is on the appellee.

What is claimed by appellee is that there was a usual line of $50,000, to which this letter of Platt's applied.

Is it true that the appellant company carried as a *usual line $50,000*, and that under this policy no insurance was to be effected, except on an excess over that line?

We contend that it is not true.

There is in insurance business no fixed usual line. In the very nature of the business there could not be a usual line of $50,000, because of the variety of vessels, cargoes, and voyages, and this company has no such usual line. (See Rec., pp, 168 and 257.)

The master in his report says:

> The amount fixed as a limit to carry on any one vessel is designated by insurance companies as their *usual line*. (Rec., p. 303.)

Then he says (p. 305):

> Policies 277, 296 and 306 were made directly with the Ins. Co. of North America, and all of them bear the clause showing they applied to the excess of the *usual lines* carried by the respondent. All of them, including 268, have the note attached reducing the amount to be reinsured from $10,000 to $5,000. These facts lead me to believe the respondent was to retain *its usual line* on all risks where it reinsured with complainant, and the risks complainant was to underwrite were only such as it (respondent) retained its usual line on.

Let us see whether there is anything in these policies to justify the statement that all of them have the clause showing they applied to the excess of the usual lines carried by the respondent.

POLICY 277.

The language is, "this policy shall apply to the excess which said Ins. Co. of North America may have on all their various policies over $60,000." (Rec., p. 84.)

POLICY 296.

The language is "to apply to the excess which the said company may have on all their various policies over $50,000." (Rec., p. 88.)

POLICY 306.

The language is "to apply to the excess, &c., over $70,000."

There is nothing in these about "usual lines"; and this only means that the policies were not to apply except in cases where there was insurance in excess of the amount named.

And then the following (p. 305) is found in the master's report:

The usual line of respondent, as appears from the evidence, was $50,000. *It generally reinsured the excess of $50,000.* This sum, therefore, was *its usual line* to be carried in all cases on risks reinsured with complainant under the contracts.

2d. And it would result that policy 268 would attach in favor of respondent, and at the ports mentioned in it and on vessel and cargo, only where the amount of the risks taken by respondent on any one vessel *exceed $50,000.*

He has interpolated the word "usual" into these policies 277, 296, and 306.

There is nothing in these as to any usual line, but only specified excess to which these shall severally attach, and from this a usual line of $50,000 is not to be inferred.

Nor was any "usual" line mentioned in the letter of Platt, Jr. What he said was that he would not accept

risks, except such as the appellant company "*carries their line on;*" not "usual" line on.

We submit that there is an entire absence of proof that there was *any such usual line.*

The master only draws an inference that there was such a usual line from the fact that in these policies insurance was effected only on an excess, added to an assertion that the company generally reinsured the excess of $50,000; and he makes that statement in the face of the fact—

(*a*) That the only witnesses who testify on the subject say there was no such usual line.

(*b*) That there was no such usual line *contracted for.*

Charles Platt, pp. 257, 258.
Wm. A. Platt, p. 177.
Charles Platt, Jr., pp. 185, 186.

(*c*) And also in the face of the other and yet more significant fact that the company *was constantly reinsuring on a line lower than $50,000 with this same company, paying premiums thereon which appellee has retained.* (Rec., 173, 174, and 175.)

(*d*) And, further, in face of the fact that appellee company had notice that reinsurance was effected on a lower line. (Rec., pp. 240, 242, and 245.)

To this may be added the significant fact that in each policy other than 268 different limits were fixed. In one $50,000, another $60,000, and another $70,000.

These special stipulations do not indicate that there was a usual line of 50,000 to which policy 268 applied, but just the contrary. The indication or inference from these is, that when there was to be a limit it was stipulated for; and this is further strengthened by the fact

that appellant had policies with other companies with other limits, *e. g.*, the Orient and a number of others on an excess of $70,000, and with others on an excess of $57,500, and with others on an excess of $40,000, and so on (p. 168).

We insist, therefore, that there was no such fixed or usual line as $50,000.

The appellant company did carry a line on all the risks complained of under policy 268 except two, the particulars as to which will be presently mentioned.

In the case of the "Obi," after all reinsurances, it carried $27,500
The "Avalona" 42,300
The "Yorkshire" 14,500
The "Impi" 35,310
The "Peruvian" 28,620
The "Ocean" 16,307
The "Etimologia" 30,000
The "Cann" 32,720

If there was not a $50,000 limit, then certainly the master erred in holding appellant liable, as he did, for losses paid on account of reinsurances on these.

There were two other risks on this policy that are complained of—the bark "Budstikken" and "The Adele."

These were peculiar in respect of the facts.

The "Budstikken."

This was an open insurance for about $35,000. Reinsurance for $20,000—$5,000 of it in the Hibernia. *Net line for N. A., $15,000.* (R., pp. 114, 115.)

The amount really at risk proved to be only $19,308, more than covered by the reinsurance; it was a total loss, and the Hibernia paid its proportion, $4,288.45.

This was an accident. The amount was reported

open. When *closed* it was much less than stated, and *meantime* the reinsurance had been effected.

And assuming that we are right that, under this policy No. 268, the appellant was not bound to carry a line of fifty thousand dollars, as contended for by appellee, we wish more particularly to consider the liability of the appellee, as to this case, upon the facts as above briefly presented.

The principle involved is very fully considered by the court in the case of Kimball *v.* The Ætna Ins. Co. *et al.*, 9 Allen, 540.

The insurance with the Hibernia was made flat before it was ascertained what the real amount at "risk" was. No representation was made that was material to the risk, nor was anything done that added to the risk. And there is nothing in the record indicating any fraud on the part of the appellant. The record simply shows that the appellant insured on what was supposed to be the value of thirty-five thousand dollars, of which sum it immediately reinsured five thousand dollars with the appellee company. This was done according to the usual course of such transactions, and without any representation whatever at the time of such reinsurance, and without the suppression of anything whatever at the time of such reinsurance of any fact known to the appellant. It was a reinsurance effected according to a long course of dealing between the two companies.

The fact that the risk only amounted to $19,308 was not known to the appellant at the time of these reinsurances; and it was not known, and could not in the nature of the case be known, that the insurance had exceeded the amount that the appellant had at risk, because information as to the value of the goods insured had not then been received, and was not available to the appellant. Therefore, no fraud can be imputed to

the appellant in connection with this transaction. It is a case where reinsurance was effected within the terms of the policy 268, unattended by any improper conduct on the part of the appellant.

In the Record, pp. 258, 266, 267, 268, 269, 270, 276, 280, 281, and 283, will be found the testimony of five witnesses that in such a case the Hibernia would be properly called upon to pay.

The other case is that of

"THE ADELE."

This was a risk (open) for $114,000.

Reinsured flat for $61,500 ($5,000 of which was with the Hibernia), leaving, approximately, $41,500 with the appellant.

It turned out that the vessel took on board at the first port only $47,392, and that before reaching the next port she lost $20,819 of her cargo; and further reinsurances were effected, $20,000.

At the second port she took on cargo of the value of $42,689, making an aggregate of cargo, including that lost, $90,081, and an aggregate of reinsurance of $81,500; but $20,000 of this did not attach until after the loss, and could not be required to contribute. (Rec., pp. 117, 164, 246.) Hibernia paid $1,692.67.

The testimony of the five insurance experts was taken as to this, and will be found at pp. 268, 269, 275, 280, and 282.

According to their testimony, this appellee was rightfully called upon to pay what was paid, unless there was such a custom that a reinsuring company should retain a line, that amounted to a representation that it would retain a line.

It is averred in the bill that "by custom reinsurance is never effected to the full sum usually insured, and that this is deemed material to the risk."

It is upon this, if at all, that the appellee was entitled to recover the amount paid in this particular instance.

The burden of proving such custom rests on appellee, and it is not sufficient for this purpose that a local custom at New Orleans shall be proven.

The witnesses who testified for appellee are Fowchey (Record, 222) and Chaleron (Record, p. 227), and they only know the local custom at New Orleans.

Therefore, the only ground upon which appellee could escape paying this risk would be some bad faith on the part of the appellant. But there was no bad faith, as the facts above recited show.

THE QUESTION ARISING UNDER POLICY 297.

This was a policy where the reinsurance was to attach to an excess over $50,000.

The insurance on this policy relates to the Skerryvore. This was for $58,569.

The excess, $8,569, was reinsured in four companies—$1,428 in the Hibernia (p. 165).

This presents this question: Can a company having an open policy, which can only attach to an excess of $50,000, apply that policy to the excess, and also reinsure in other companies amounts below the excess, or must it maintain a line at its own risk at $50,000.

The practice in this regard is stated in the record at p. 109.

From this it will be seen that companies claim the right to change the line on any vessel. Of course they cannot change so as to affect a line stipulated for, but this is not a stipulation to keep its own risk up to the amount named, but only that the policy shall not attach to anything, *except the excess over the amount named.* That policy can be used only in such a case, and only after a certain amount has been reached. It would seem, therefore, to be quite clear that there is nothing

in the contract that requires the line to be maintained by the reinsuring company.

The case may be thus stated for illustration:

It is stipulated that a policy shall only attach to an excess over $50,000. There is $60,000 insurance admitting of a reinsurance of $10,000, and that has attached. That is strictly according to the contract. Now, if in some other company, a part of the remaining $50,000 is reinsured, could it be that that would make void the $10,000 reinsurance already contracted?

It was a lawful and binding contract when the reinsurance was made; there was no stipulation that it should become void if further insurance was effected. Nor is the liability of the reinsuring company in any way affected, nor its risk in any way increased.

If there is any answer to this it must be found in some express agreement, such as is alleged to have been made with Platt, Jr., or in a recognized and accepted custom, such as is averred in the appellee's bill, neither of which, as we have tried to show, exist in this case.

A different question arises under policy 296. (Rec., p. 128.)

"THE MATCHLESS."

That case is, in substance, this.

Policy 296 was also for an excess of $50,000.

Appellant was applied to for $140,000, and accepted it. It turned out to be $123,488.

It had open reinsurance policies with other companies on an excess of $70,000.

With these companies appellant reinsured $65,000 on this excess of $70,000.

But it had this other policy, and two others with other companies, on an excess of $50,000. And on these, reinsurance was effected to the aggregate amount of $20,000, being the difference between $50,000 and

$70,000. It will be observed, therefore, that there was no insurance below the $50,000 limit.

There was a total loss, and the question arose, and is to be here determined—

WHAT DISTRIBUTION OF IT SHOULD BE MADE AMONG THESE COMPANIES?

The distribution that was made was by assessing against the policies, that provided for an excess of $70,000, *pro rata* the amount in excess of $70,000. The excess was $65,000, which was ratably assessed against these. While the companies, on policies in excess of $50,000, were called upon to pay the difference between $50,000 and $70,000—$20,000, *i. e.*, the Hibernia, $10,000; the New York Mutual, $5,000; the Insurance Company of Pennsylvania, $5,000.

This, it will be observed, is only a question of accounting or distribution.

The master says it should have been divided among all the companies *pro rata.* (Rec., pp. 315 and 316.)

He overlooked the fact that policy 296 expressly provides for pro-rating with others on the same excess.

But these others were not on the same excess, but on an excess of $70,000.

By the very terms of the policy 296, it could not prorate with the others.

On this the master charged appellant with $1,261.67.

The same question arises in the case of the ship

"ADAM SIMPSON."

Here, again, were policies on different excesses. Some on an excess of $57,500; (Record, p. 139;) policy 296 and others on an excess of $50,000.

But the master held that all these companies should have been required to pay *pro rata*, although by the

terms of 296 appellee was only entitled to pro-rate with policies having the same excess.

On this account he has charged complainant with $2,765.19.

With reference to three of these reinsurances, to wit, on the "Obi," the "Avalona," and the "Impi," as to which, as hereinbefore referred to, it was stated on the face of the applications that they were on excesses less than fifty thousand dollars, the appellee undertakes to escape from the effect of such notice by saying, in substance, that there was nothing to indicate that there might not have been other cargo on which the appellant was carrying insurance which would bring the amount retained by appellant above the sum of fifty thousand dollars.

Not conceding that there is any force whatever in this contention of appellee, but insisting to the contrary, we urge that such a contention is not available to the appellee in this case, because the attention of the appellee was especially directed to the fact that these applications were on a limit less than fifty thousand dollars, and, according to the evidence introduced by the appellee, that subject-matter was specially considered; so much so, that Mr. Prevost, who was intrusted with this business as an officer of the Hibernia Company, says, that he called the attention of Marshall J. Smith & Co., who represented the appellee, to these applications; and he says that Mr. Marshall J. Smith stated, that "this application only shows, so far as it goes, that they might have other cargo on board the vessel." (R., pp. 202, 204.)

And then these two representatives of the appellee proceeded to satisfy themselves, by an argument between themselves, that there was no implication that the appellant did not carry $50,000 of risk.

Now we most respectfully submit that, the attention

of the officers of the appellee having been specially directed to this subject at that time, it was the duty of appellee to ascertain the facts in that regard if the appellee did not intend to take a risk unless the other company carried $50,000; and that, under such circumstances, the appellee is now estopped to deny its liability on such reinsurance.

The good faith of the North America Company in respect of this business has been impugned.

This is answered by this record, from which it appears that out of hundreds of cases of reinsurance with the appellee, but thirteen are made the subject of criticism, and that a large number of reinsurances were made with appellee precisely like these complained of below a $50,000 limit, where there were no losses, on account of which appellee received from appellant premiums which have been retained.

S. SHELLABARGER,
J. M. WILSON,
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